THE OMBUDSMAN OF ONTARIO

ANNUAL REPORT
1986-87

VOLUME I

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The Ombudsman | Ontario

June 30, 1987

The Speaker
Legislative Assembly
Province of Ontario
Queen's Park
Toronto, Ontario

Dear Mr. Speaker:

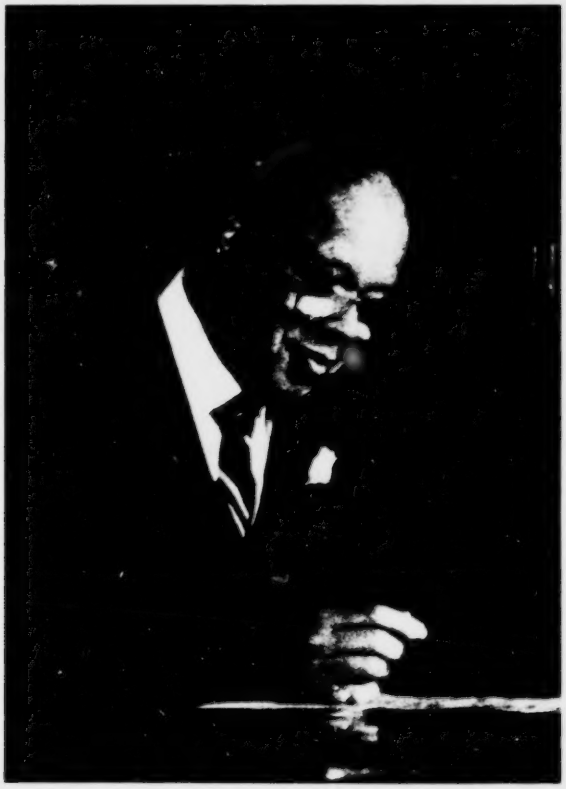
It is an honour and a pleasure to present the Fourteenth Annual Report of the Ombudsman for the period April 1, 1986 to March 31, 1987.

This report is submitted pursuant to section 12 of the Ombudsman Act.

Yours sincerely,

Daniel G. Hill

Daniel G. Hill



DANIEL G. HILL

OMBUDSMAN'S MESSAGE

The mandate of the Ombudsman is to serve as the protector of the people in their dealings with government. In Ontario the Ombudsman fills this role by investigating complaints against the more than 500 provincial ministries, boards and agencies that employ more than 80,000 public servants.

Three years have passed since my appointment as Ombudsman when I made my commitment to expand public consciousness about the vital role and function of the Ombudsman and increase accessibility to the services of this Office.

In my last report I stated that the workload of this Office reached an all-time high with the closing of 5,235 jurisdictional complaints, 6,266 non-jurisdictional complaints, and 2,709 information requests for a total of 14,210 for fiscal year 1985-86.

In this report I am pleased to announce a new high water mark in the efficiency of this Office. During the past fiscal year 5,897 jurisdictional complaints, 8,424 non-jurisdictional complaints and 3,005 information requests were closed, for a total of 17,326, an increase of more than 20%. Moreover, during 1986-87 we closed 146 more **complaints** which had been under investigation for more than one year than we closed during the previous fiscal year. This represents an improvement of 30% in the number of older complaints closed and has reduced the number of ongoing **investigations** of more than one year in duration by about 25%.

There is no secret to this success. We are simply reaching out to more people and reaching them more effectively.

In the last year I launched several initiatives to improve our accessibility.

Our Directorate of Regional Services has been supplemented with an additional Field Officer for Sault Ste. Marie and surrounding area. Also, North Bay and area is being serviced by a Field Officer. A vigorous program of community outreach by all Regional Services personnel has produced excellent results.

The public education activities of this Office have been expanded with the creation of a Community Relations Unit to organize educational seminars, workshops and conferences.

We have intensified our outreach activities with organizations for the developmentally handicapped and with ethnocultural communities. This year's activities included contact with approximately 50 groups for the developmentally handicapped to explain our services and an all-day conference at the Columbus Centre with service professionals of Metro Toronto's Italian Community.

My commitment to ensure that Aboriginal people in Ontario have equal access to the services of my Office has been strengthened with the appointment of a Northern Native Liaison Officer, to work with our current Native Liaison Officer.

Another initiative has involved the reorganization of the investigative units of the Office in order to redefine areas of expertise in complaint handling and improve our ability to investigate effectively concerns raised with us by complainants.

A further initiative has involved efforts to ensure that all young offenders have direct access to the services of my Office. I urge the Ministries of Community and Social Services and Correctional Services to give serious thought to the expansion of in-house advocacy services for young offenders to better comply with the intent of the **Young Offenders Act** that provides for equal treatment in all respects, regardless of age.

Our outreach activities were also directed at the governmental organizations themselves. In order to strengthen our relationship with these organizations and resolve jurisdictional complaints quickly we have created several small, intensive working committees as informal complaint resolution mechanisms and channels for communications.

To date, these committees have involved the Ministry of Correctional Services, Workers' Compensation Board, Ministry of Education, Metro Toronto Housing Authority, and the Ontario Health Insurance Plan. Other governmental organizations will be included in the future.

And finally a new toll-free telephone number has been introduced. Now, the services of this Office are literally at the fingertips of all Ontarians.

As I have indicated in previous reports, I am committed to achieve the best possible economies and efficiencies with limited resources. Therefore, during the present fiscal year our resources will not be used to expand our programs, but rather to consolidate and strengthen our existing services.

I am pleased that the Standing Committee, in its 15th Report, recommended that the amendments to the Ombudsman Act be tabled in the Legislature without delay and that all parties cooperate in speeding the progress of the amending bill through the House. I am hopeful the Committee will, in the near future, be able to give careful review to my Position Paper on Expanding the Jurisdiction of the Ombudsman and thoroughly consider the issues of expanded "ombudsman function" in this province. Also, I commend the Committee for completing their second trip to the North, this time visiting communities and reserves in northwestern Ontario to witness at first hand the issues concerning people in the North and to help heighten awareness about the function of the Ombudsman.

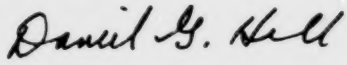
I was pleased to accompany the Committee on this trip which included public hearings at Sioux Lookout and Thunder Bay. Also community meetings were held at Fort Severn Reserve and Big Trout Lake Reserve where more than 100 band members participated.

It is gratifying to know that the Committee sees a pressing need for a Federal Ombudsman and has recommended that the Premier of Ontario urge the federal government to establish a Federal Ombudsman with jurisdiction over all federal departments, programs and agencies that impinge upon the lives of people across the country.

I also wish to express my appreciation to Ontario's civil servants. Without their goodwill and continued cooperation the Ombudsman's efforts cannot be successful. I commend the commitment and professionalism that is so generally prevalent among our officials.

I express my gratitude to my excellent and able staff. The people of Ontario can be proud of the men and women of this Office who work so hard on their behalf.

I am proud of our progress in the last fiscal year and I will continue to work for full accessibility to our services for all the people of Ontario.



Daniel G. Hill

HIGHLIGHTS

This is the fourteenth occasion for tabling an Annual Report in the Legislative Assembly. The Report deals with the activities of the Ombudsman's Office from April 1, 1986 to March 31, 1987.

- This Report is divided into two volumes. Volume I is an overview of the operations of the Ombudsman; Volume II deals with recommendations made by the Ombudsman that were denied by various governmental organizations.
- Last fiscal year marks the largest volume of work handled by the Office since its inception. (p. 5)
- The Office was instrumental in obtaining a total of approximately $1,000,000 in lump sum payments to workers in the past year. (p. 7)
- An amendment to the **Ombudsman Act** is discussed to ensure that developmentally handicapped residents of Schedule I facilities have the same rights of access to the Ombudsman as do residents of other provincial facilities. (p. 8)
- Concern is expressed about the inequities in care and resource allocation to young offenders that is contrary to the intent of the **Young Offenders Act.** (p. 9)
- Concern is expressed about the unacceptable living conditions at the Barrie Jail and overcrowding at the Whitby Jail. (p. 10)
- The Standing Committee on the Ombudsman is encouraged to consider expansion of the Ombudsman's jurisdiction. (p. 12)
- Statistical information presented includes the dispositon of all complaints closed by this Office in fiscal year 1986-87. (pp. 14 to 17)
- Budgetary expenditures are presented. (p. 17).

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INTRODUCTION

This Annual Report covers the fiscal year from April 1, 1986 to March 31, 1987. The Report has been divided into two volumes.

Volume I provides an overview of our last fiscal year and includes a selection of case summaries which illustrate the varied complaints that come before the Ombudsman.

Volume II is devoted entirely to detailed summaries of recommendation denied cases and tables of all recommendations outstanding from past Reports.

Fiscal Year 1986-87

In commenting on the past fiscal year, 1986-87, I am delighted to report that our trend toward greater efficiency has increased dramatically. The number of complaints and information requests closed in the past fiscal year has increased from the previous year to an all-time high of 17,326, an increase of more than 20% over the previous fiscal year. This includes 5,897 jurisdictional complaints, 8,424 non-jurisdictional complaints and 3,005 information requests, compared to 5,235 jurisdictional complaints, 6,266 non-jurisdictional complaints and 2,709 information requests for the previous fiscal year.

Delays Outside Our Control

As I reported in my last Annual Report, our new computer system allows us to collect and maintain much more accurate statistics on all of our complaint handling processes. New reports from this system have provided management with tools for early identification of problem complaints, easy monitoring of investigative processes, and effective information for performance appraisals.

As part of the improvement in our collection of statistics, we have now started to collect information about the time taken by governmental organizations to respond to letters and reports at various stages of the investigation. While the collection of this data is still in its formative stage, I can report the following:

1. On the average, it takes a governmental organization four weeks to respond to our initial notice of intent to investigate.
2. Once a tentative conclusion and recommendation has been forwarded to the ministry for comment, an average of four months is taken by the government agency to respond.
3. A final report is responded to, within three and a half months on average.

These figures vary widely between ministries and agencies and I have not yet enough accurate data to pinpoint the problem areas. We will, however, be continuing to collect this type of information, and, in the next fiscal year, we will be able to use it to try to improve the speed with which governmental organizations respond to our contacts, and, in turn, strive to lower our response and reporting time.

INVESTIGATIVE REORGANIZATION

In April, 1985, a new administrative structure was put in place in my office comprised of five investigative teams and an intake area. This reorganization streamlined reception of complaints, and provided for development of areas of expertise in complaint handling.

This year, we have reviewed the effects of this reorganization, and made some adjustments to the assignments of policy areas, and the number of investigators per team. This has been necessary because of changes in the types of complaints we received. For example, the changes in structure at the Workers' Compensation Board have meant a substantial decrease in the number of complaints concerning Workers' Compensation coming to my Office. It was therefore necessary to reduce the number of investigators assigned exclusively to Workers' Compensation complaints, add several new policy areas to that team, and transfer some team members to other teams. These and other changes took place on April 1, 1987. We are continuing to monitor case loads and complaints received, to ensure that our organizational design meets current needs.

REGIONAL SERVICES

I remain very committed to a strong and diversified regional services program.

There are currently four full-time district offices outside of Toronto: Ottawa, Thunder Bay, Timmins and Kenora. Each of these offices is staffed by a District Officer and an Information Officer whose combined energies make the Office of the Ombudsman accessible to many groups and individuals in their respective areas.

In addition, during this past fiscal year, three part-time Field Officers have been operating in Windsor, London and Sault Ste. Marie. A fourth part-time Officer, in North Bay, has been appointed in order to maintain an appropriate service level following the closure of the full time North Bay Office.

The part-time Field Officers work out of their homes and reflect my attempt to provide as much accessibility as possible to the people of Ontario out of existing financial resources.

A major component of the entire Regional Services program is the activity of community outreach. All of the Regional Services staff, including the part-time Field Officers, devote a large part of their time engaging in public education with diverse groups, such as the elderly, the handicapped, labour, women, and native people. As a result of engaging in this activity during the past year, our Office has reached many more groups and citizens in the regional centres.

The past year witnessed a consolidation of efforts to forge a stronger link between the Office of the Ombudsman and native organizations, particularly rural and remote native communities in the province. To this end I employ two native people on staff. Mr. Allan Pelletier, Native Program Officer, acts as provincial liaison coordinator of all native activities and as a resource consultant to all our investigators when native complaints are received. During the past year Mr. Pelletier met with many of the major provincial native organizations and attended the annual conference of the Nishnawbe-Aski nation, Union of Ontario Indians, Association of Iroquois and Allied Indians, and Chiefs of Ontario. On behalf of our Office Mr. Pelletier attended in Ottawa at the First Ministers Conference on Aboriginal rights and Constitutional matters with observer status.

In addition, I created a new position, effective April 1, 1987, titled Northern Native Program Officer. Mary Lou Iahtail, the former district officer in the Timmins Office, was appointed to this position. She is fluent in English, French, and Ojicree. Ms. Iahtail will engage exclusively in outreach work in the remote native communities in an effort to provide increasing accessibility to people who cannot ordinarily reach the Ombudsman with complaints whether due to geographical or cultural remoteness or both.

As a reflection of my special interest in the unique problems of the developmentally handicapped, I have created a special project, within the Regional Services framework, whereby one of our most senior investigators engages in outreach activity and investigates complaints relating to persons with developmental handicaps.

Included in the plans for the next fiscal year are the conducting of community outreach events in each of the regional areas, a comprehensive study of northeastern Ontario in order to determine the best possible location for a new full-time office in that area, completion of an evaluation of the Field Officer project, and possible expansion to other parts of the province of the existing part-time field officer program.

PUBLIC EDUCATION

To make the services of this Office better known to all Ontarians I have reorganized the public education functions of this Office into a Communications and Publications Directorate and a Community Relations Unit.

Publications have been expanded to include regional newsletters. Our multilingual fact sheets, now in 12 languages, have been expanded to include Korean, Hindi and Kannada.

More emphasis has been placed on audio-visual materials. We have produced a 13-minute slide show and audio tapes on the role and function of the Ombudsman to assist our roster of public speakers when attending community functions.

The activities of our Community Relations Unit include the organization of seminars, workshops and conferences for front-line service providers, meetings with representatives of various communities, distribution of public education materials and attending and speaking at various public functions.

In October of this year a major public education initiative will be undertaken in the form of an Ombudsman Awareness Week so that more Ontarians will be made aware of this very vital service.

NEW APPOINTMENTS

During the past fiscal year I made the following appointments to my senior operating staff:

Assistant Director — Land Use, Resources, Revenue:
Catherine McKay

Community Relations Coordinator:
Karen Wheeler McSweeney

In addition, with the development of the new regional field officer program, I have appointed the following persons:

Field Officer — Sault Ste. Marie:
Johanna Bischoping

Field Officer — North Bay:
Pauline Desbiens

Also, in the Directorate of Regional Services:

Northern Native Program Officer:
Mary Lou Iahtail

GOVERNMENTAL COMMITTEES

The committees I reported on last year continue to provide a channel for communication and resolution of complaints between the Ombudsman's Office and various Ministries and Boards. In particular, the committee of officials from my Office and the Ministry of Correctional Services has met regularly to discuss cases and general issues. The Workers' Compensation Board committee has also provided an excellent forum for the resolution of complaints against that governmental organization.

Other liaison groups have also been formed. The Ministry of Education has cooperated with my Office in setting up a committee to review complaints against that Ministry. Similarly, the Metropolitan Toronto Housing Authority Chairman, John Sewell, has met with my staff and arranged for a priority review of complaints against that Authority by its staff members, to expedite resolution where possible. A recent initiative has resulted in closer cooperation between my Office and the Ontario Health Insurance Program, and meetings have been held with officials of other Ministries in an attempt to streamline our investigations.

I look forward to further fruitful contacts with Ministry officials, and am confident that many of the complaints we receive can be resolved in an informal way if channels of communication with the Ministry involved are well developed.

FINANCIAL COMPENSATION FOR COMPLAINANTS

As I have stated in previous reports, I would be concerned if the amount of financial compensation obtained by my Office on behalf of complainants were to become a measure of my effectiveness; I am convinced that many of the results I obtain are more important than mere amounts paid over. Nevertheless, it may be of some interest to note that my Office was instrumental in obtaining approximately $1,000,000 in lump sum payments to workers through the Workers' Compensation Board in the past year. This compares most favourably with last year when a total of approximately $500,000 was paid. I should add, however, than an unprecedented number of my recommendations were accepted in the present fiscal year, and fewer complaints will come to my attention in the future, given the changed structure of the Workers' Compensation appeals.

In other areas, financial compensation has been obtained for lost pension coverage, severance pay or vacation pay in employment complaints, and for legal fees unreasonably incurred by a complainant. Overpayments in taxes, compensation for errors in assessment, and rebates in sales taxes were also obtained.

In most of the areas we investigate, however, it is impossible to calculate compensation in monetary terms. Our investigation of complaints concerning social benefits, housing, health and education, for example, will often result in a recognition of eligibility for benefits, the amount of which cannot be determined as payments may be ongoing. Other less tangible benefits may lead to improved employment prospects, better living conditions, or a better education program for a child. While not measurable in dollar amounts, these achievements are some of our most important.

SERVICES FOR THE DEVELOPMENTALLY HANDICAPPED IN ONTARIO

Further to the appointment of a Special Projects Officer in April, 1986, whose responsibility has been to focus on the area of developmental handicap, there has been an increased awareness of the role, function, and appropriate use of my Office's services by individuals and groups with interests in this area. Our Officer has made contact with more than 50 Local Associations for the Mentally Retarded, Adult Protective Service workers, Service Coordinators, and other organized groups with a direct interest in developmentally handicapped Ontarians in order to enhance our accessibility and canvass them on issues of concern. In addition, many such organizations have made representations to our Officer either on behalf of individual clients or on more generic policy issues.

I have been struck by the wide diversity of interest groups with involvement in the area of developmental handicap. There is a sizeable contingent of groups which in some cases operates in isolation from the traditional service network. We have been able to provide informed advice on avenues of redress not previously considered to many of these groups. This action on the part of my Officer has often resulted in the resolution of issues without the commencement of formal investigations by the Ombudsman.

In the forthcoming months I intend to visit personally one or more Schedule I facilities to continue the institutional outreach program started by the Officer. As well there will be a continuation of community outreach and education to interest groups, complaint intake, and the investigation of complaints.

Further, I have requested an amendment to the **Ombudsman Act** to ensure that those residents of Schedule I facilities wishing to contact my Office directly will be provided with the same rights pursuant to section 17 (2) available to residents of other provincial facilities.

PSYCHOTRAUMATIC DISABILITY ENTITLEMENT

Last year I reported that a member of my investigative staff would begin a special study of our files containing objections to decisions made regarding psychotraumatic disability entitlement by the Workers' Compensation Board. A report is now in its final draft stage.

The study began with an overview of the Board's legislation, policy and practices concerning claims involving psychological problems, and then went on to look at our files to see how individual cases were handled.

Between 1977 and March 1986, 161 jurisdictional complaints respecting psychotraumatic entitlement were brought to this Office; of that number, 122 files contained either a report or a summary of facts detailed enough to provide explicit information for the study.

Very shortly the report will be sent to the Workers' Compensation Board to ask for its comments and, once the Board has had an opportunity to respond, the report will be made more widely available.

TIMMINS HOUSING AUTHORITY

As stated in the last Report, in response to a proportionately large number of complaints from tenants and applicants in the Moosonee area, I started a special project to investigate the Timmins Housing Authority's administration of rent-geared-to-income housing in Moosonee. The investigation was initiated in December of 1985, in accordance with Section 15 (2) of the **Ombudsman Act.** The investigation included interviews with Housing Authority staff, tenants and applicants, as well as an extensive review of the Housing Authority's tenant and applicant files. In December of 1986, the interim results of the investigation were reported to officials of the Housing Authority, the Ontario Housing Corporation and the Ministry of Housing and included approximately 40 recommendations concerning matters of housing policies, practices and procedures. A response from these agencies to the interim results was recently received and is under review.

MINISTRY OF HEALTH

NURSING HOME INVESTIGATION

In the previous Annual Report I discussed my investigation of the Ministry of Health's actions and decisions in response to allegations of sub-standard operations of Elm Tree Nursing Home.

On August 29, 1986, I issued my report on the results of this investigation and made a number of recommendations including the recommendation that the Ministry of Health develop a program for the placement of a full-time patients' advocate in each of the province's nursing homes.

The Deputy Minister responded that the issue of patients' advocates is currently under review by a commission headed by Sean O'Sullivan. I advised the Minister of my decision to accept his representation and requested that he inform me of the results of the commission's findings.

INSTITUTIONAL INVESTIGATIONS

The past year saw a significant increase in the extension of my services to persons confined to provincial government institutions. During the fiscal year, we handled and closed 20% more complaints from institutionalized persons than in the previous fiscal year. More importantly, our average daily in-progress caseload was reduced by 40% by the end of the year, an indication of our increasing ability to respond more quickly to the problems of institutionalized persons.

My staff in this area have an orientation to mediation and conciliation which is well suited to resolving complaints in institutional environments. This cooperative approach to complaint handling has been particulary well received by the Ministry of Correctional Services and has resulted in a consistently high success rate of complaint resolution and complainant satisfaction.

Although I believe my Office has already achieved a relatively high profile within institutional settings, I have always been concerned that every institutionalized person have the same access to the Ombudsman as any other citizen. My continuing visits to provincial government institutions have reinforced my belief that more education about the role and function of the Ombudsman is required. Last year these visits included the Ottawa-Carleton, Quinte and Hamilton Wentworth Dentention Centre. More visits to other institutions are planned for the coming year.

We recently hosted a group of correctional officers from the Ministry of Correctional Services for a two-day orientation to the Office of the Ombudsman. As well, we have agreed to participate in the development of a video-tape orientation program for newly arrived inmates at the Guelph Correctional Centre. These efforts reduce misconceptions and improve undertanding and will be continued and expanded.

In addition, we have recently re-issued Ombudsman information posters to all Ministry of Correctional Services institutions and will shortly be providing the same materials to other provincial government institutions. In the spirit of cooperation, the Ministry of Correctional Services has agreed to mount our posters under plexiglass to ensure their permanence in the institutions.

At the same time, the Ministry of Correctional Services is rapidly expanding the Charge-a-Call telephone system which will allow inmates quicker and more direct access to the services of the Ombudsman when needed. Allowing inmates telephone access to the outside world, I believe, represents a major step forward. It recognizes that the majority of inmates are capable of responsible behaviour in their contacts with the community. Not only is this a great benefit to inmates who are now able to maintain community contact, but it reduces the heavy workload of institutional staff who may now properly devote more time to ensuring that the legal mandate of the Ministry is carried out with respect to inmate care.

In my last Annual Report and in my subsequent comments to the Standing Committee, I called upon the government to resolve the very real problems being caused by the continuation of the "split" jurisdiction for young offenders. I am pleased that the government has seen fit to transfer three secure custody facilities for young offenders from the Ministry of Community and Social Services to the Ministry of Correctional Services to alleviate the bed shortage caused by the rapid increase in the number of 16 and 17 year old young offenders being committed to secure custody.

However, this is a temporary solution. Nothing I have seen in the past year has changed my mind in calling on the government to end the "split" jurisdiction for young offenders. Until such time as young offenders come under one administrative umbrella, I believe that inequities in care and resource allocation will persist. This appears contrary to the intent of the **Young Offenders Act** that all young offenders, regardless of age, be treated equally in all respects.

Although my Office's jurisdiction to investigate complaints from young offenders is severely restricted by the existence of statutory complaint procedures in the enabling legislation, we will in the coming year renew our efforts to ensure that all young offenders have direct access to the services of my Office. I remain concerned that while the rights of young persons and avenues of redress are well set out in the legislation, many young people in conflict with the law lack the ability to exercise these rights by themselves. I therefore call upon the Ministries responsible to give very serious thought to the expansion of in-house advocacy services for young offenders.

Last year, attention was drawn in this Report to unacceptable living conditions for inmates at the outdated Barrie Jail. The government was urged to provide funds for the replacement of the facility. it is disappointing that no progress has been made in this regard. Although I am satisfied that the Ministry of Correctional Services has done whatever is possible with scarce resources to ameliorate conditions for inmates and staff at that institution, the quality of the environment at that institution does not meet minimum acceptable standards as we approach 1990.

Overcrowding has been a recurring problem in the provincial correctional system over the past ten years. In the recent past, this problem was the subject of legal action between the Ministry of Correctional Services and the Ontario Public Service Employees Union. Although this matter was resolved without the need for litigation, I believe that this problem may now be re-emerging. Over the past year, I have been alarmed at the increase in the density of inmate population in institutions on the fringe of Metropolitan Toronto. I am particularly alarmed about the situation at the Whitby Jail where my staff advise me that despite an increase in operational capacity in the last few years, inmates are regularly confined three to a cell which was originally constructed to house one inmate.

I believe that this high population density leads to increased tension. Under the circumstances, it is not surprising that my Office received more complaints from the Whitby Jail last year than from any other provincial correctional institution, notwithstanding that the Whitby Jail's operational capacity is only 30% that of larger Ministry institutions which produced half that number of complaints. We will be monitoring complaints received from this institution closely and will discuss our assessment of the situation with senior staff of the Ministry of Correctional Services.

SECONDMENT PROGRAM

In last year's report, I announced the commencement of a staff secondment program with the Ministry of Correctional Services. I am pleased to advise that we have now completed the first phase of this ongoing program and it has proven to be so worthwhile that we will be continuing and expanding it in the near future.

In the first phase, an experienced Probation and Parole Officer from the Ministry of Correctional Services spent nine months working as an Investigator with our Institutional Investigations team. This phase ended positively when the Ministry's secondee won a promotional competition to return to a more senior position in the Ministry.

As a result of our experience, we have asked the Ministry of Correctional Services to second another staff member to our Office this year and we are currently in the process of arranging for one of our investigators to be seconded to the Ministry of Correctional Services.

It is my belief that exchanges such as these will be of mutual benefit.

THE REPORT ON THE INVESTIGATION OF ARGOSY COMPLAINTS

The Report on the investigation of the Argosy complaints was delivered on November 21, 1986, to the Minister of Financial Institutions and Consumer and Commercial Relations and the Ontario Securities Commission. The Report concluded that there had been a number of administrative failures in the regulation of the Argosy Financial Group of Canada.

It recommended that the Ministries responsible compensate investors for 50% of their losses, plus interest. The Minister informed the Ombudsman that he would not implement this recommendation. As a result, the Report was sent to the Premier and brought before the Standing Committee of the Legislature on the Ombudsman.

Specifically, the Report found that: the government failed to regulate Argosy's syndicated mortgage business which involved $21.7 million in investment funds from the public; it failed to investigate and take timely action against Argosy's conduct as a registered mortgage broker; and it failed to monitor and regulate Argosy's RRSPs. In addition, Argosy's debenture prospectuses were accepted by the Ontario Securities Commission, despite its officials' certain knowledge that Argosy was "in a great deal of trouble".

The complainants are investors, some of whom registered complaints seven years ago, shortly after Argosy's failure in March, 1980. The delays were a regrettable feature during this investigation. An initial delay of one year and eight months was necesary while the OPP completed its fraud investigation. Our files were closed during this time. The investigation was reopened in 1983 only after the previous Ombudsman gave the Attorney General an assurance that his investigation would not jeopardize the fraud trials that were then in preparation. Our investigation was conducted over a period of one year and nine months. Twenty-nine people were interviewed and Ministry files spanning 11 years were reviewed. The investigation was substantially completed by the end of 1984. However, in accordance with the assurance given to the Attorney General, no action was taken until the fraud trials were completed, convictions obtained and appeal periods expired.

The interim report inviting representations from the government and all parties concerned, was sent on November 25, 1985, pursuant to section 19 (3) of the **Ombudsman Act**, to the Minister and affected government agencies. The representations were made on August 7, 1986. The Minister's representations were made in two parts, the first dealing with the position of the Ontario Securities Commission and the second concerning the position of the Registrar of Mortgage Brokers. Further representations were made by other affected individuals.

The final report on the Argosy investigation was referred to the Premier on January 23, 1987, and duly tabled in the House as a Special Report. The Standing Committee on the Ombudsman considered the Report in April.

In May, members of the Committee decided, by a one-vote margin, not to support my recommendation for compensation. A minority report was issued by five dissenting members.

I, and the more than 300 Argosy investors who approached this Office are deeply disappointed with this result.

UNRESOLVED ISSUES

OFFICE OF THE PUBLIC TRUSTEE

In last year's Annual Report, I commented on the lack of cooperation by the Office of the Public Trustee in its dealings with my Office. My concern was not with the merits of the complaints made against the Public Trustee, but with the lack of cooperation. I indicated that if the matter could not be resolved through negotiation with the Public Trustee, I would be forced to resort to the Courts.

In response to my concerns, the Standing Committee on the Ombudsman invited the Public Trustee to attend before it to discuss the issues raised by me. At the request of the Standing Committee, my Office prepared a summary of 18 complaints outlining details of specific difficulties encountered by my staff in dealing with the Office of the Public Trustee. There were three arguments raised by the Public Trustee to explain his reluctance to provide my Office with access to his files: the statutory duty of confidentiality of the Public Trustee regarding all information and documents in his possession; the duty of confidentiality arising from a solicitor and client relationship to certain patients; and the fact that the Public Trustee felt that I was acting outside my jurisdiction by investigating cases where the Public Trustee acted pursuant to a court appointment.

On December 18, 1986, the Standing Committee, in its 15th Report, commented on the issue of the Public Trustee. The following recommendations were made: (1) that the Ombudsman and the Public Trustee set out in a formal agreement the proper jurisdictional sphere of Ombudsman investigations of complaints; (2) the Office of the Attorney General assist the Ombudsman and Public Trustee in reaching this agreement; and (3) that the **Ombudsman Act** be amended in the present session of the Legislature, or as soon as possible thereafter, to provide for an override of the confidentiality provisions of the **Public Trustee Act** and any other rule under which the Public Trustee claims confidentiality.

Although I have met with members of the Office of the Attorney General to discuss the implementation of the recommendations of the Standing Committee, no formal agreement has yet been reached. The relationship between the two Offices continues to present difficulties. There are four recommendation denied cases involving the Public Trustee which are outlined in Volume II of this report.

In three of these cases the Public Trustee has taken the extraordinary course of applying to the surrogate court for the passing of his accounts. In one case the Public Trustee's committeeship ended ten years ago. Use of this legal procedure is cause for considerable concern because it affects my process and because it is likely to have serious consequences for the complainants, who are now faced with a court action.

Although I am not disputing the Public Trustee's legal right to have his accounts passed I consider his exercise of that right at this stage grossly unfair to complainants and an attempt to deny them the outcome of my favourable recommendations. Furthermore, the effect will be a duplication of effort. Again, without in any manner disputing the jurisdiction of the surrogate court, I consider the three complaints are properly before me as Ombudsman and in due course will be properly before the Standing Committee for consideration as recommendation denied cases.

If the court proceeds to hear the cases the complainants will be seriously disadvantaged as none of them have the resources or expertise to present their arguments; all will require legal representation. Furthermore, I have no standing before the Court and will have no opportunity to ensure that the issues I consider important are brought to the attention of the Court. Proceeding to the surrogate court at this time appears to be an effective blocking mechanism.

At the time of publication of this report, I have written to the Public Trustee to request that he not proceed with the passing of accounts but that he allow my process to be completed. It is my sincere hope that he will accept my argument and that these particular problems will be resolved.

ONTARIO LABOUR RELATIONS BOARD LITIGATION

In 1985, the Ontario Labour Relations Board rejected the Ombudsman's authority to investigate the merits of its decisions. The Board argued this was improper and outside the Ombudsman's statutory authority. The Ombudsman's Office has investigated decisions of the Labour Board since the Office was created, some 12 years ago. The Ombudsman felt very strongly about the position being taken by the Labour Board because it not only affected Labour Board complaints bul also complaints against all quasi-judicial tribunals such as the Ontario Municipal Board, the Commercial Registration Apeal Tribunal, the Criminal Injuries Compensation Board, the Social Assistance Review Board, and the Workers' Compensation Board.

I believed that this matter had been resolved by the Ontario Court of Appeal in 1979 when the Court concluded that the Ombudsman had jurisdiction over the Health Disciplines Board which is also a quasi-judicial tribunal.

In September, 1985 the Divisional Court unanimously concluded that the Ombudsman did have jurisdiction over the Labour Relations Board. The Board did not accept this position and appealed the decision to the Ontario High Court.

On January 7, 1987, the Ontario Court of Appeal released a unanimous decision, strongly supporting the Ombudsman's right to investigate the merits of the Labour Board's decisions as well as the decisions of all other Ontario quasi-judicial tribunals. The Labour Board has requested leave to appeal this decision to the Supreme Court of Canada and we await the Court's ruling. As a result of these appeal procedures our 24 files with the Labour Board have been held in abeyance pending the Supreme Court's decision.

EXPANDED JURISDICTION

In 1985 I suggested that it was time to examine the Ontario Ombudsman's jurisdiction. The Ombudsman's jursdiction has remained fixed since 1975.

I made the suggestion that the Standing Committee consider whether the Ombudsman should have his jurisdiction expanded. The Standing Committee on the Ombudsman requested a position paper on this issue from the Ombudsman.

In September of 1986, I tabled my position paper with the Committee. The paper suggested that the Committee consider three possible areas to be added to our jurisdiction: the Ontario New Home Warranty Plan, Children's Aid Societies, and Public Hospitals.

The paper also recommended that the Committee conduct public hearings to involve any agencies that may wish to participate in discussions on possible expanded jurisdiction. It is hoped that the Standing Committee will discuss this policy paper in the near future.

ARTICLING STUDENT PROGRAM

The Office of the Ontario Ombudsman has, since its inception, retained the services of articled students-at-law. Currently the Office employs five articling students under the supervision of the Ombudsman's General Counsel. The students are involved in all aspects of the Ombudsman's responsibilities including investigation of complaints, interviewing members of the public, and carrying out the traditional legal responsibilities of students-at-law.

Of particular note is the fact that for several years our articling students have been participating in a program with the Supreme Court of Ontario where they are placed with a Supreme Court Justice for approximately two weeks. During this time, the students observe the court procedures and may assist the Justices in clerking functions.

THE ANNOTATED OMBUDSMAN ACT

The Ontario Ombudsman's office is involved in an interprovincial Ombudsman project to annotate the **Ombudsman Act.** The Ombudsman Acts of the nine Canadian provinces that have Ombudsmen are quite similar. Many of the Offices including the Ontario Office are participating in preparing an annotation of the **Ombudsman Act** in an attempt to create a useful guide for all Ombudsmen in Canada.

FRENCH LANGUAGE SERVICES

In response to new provincial legislation, the **French Language Services Act, 1986,** the Office established a committee to plan the implementation process. Each section of the Office is represented on this Committee to determine how best to meet the requirements of the Act in providing services to the public in both official languages.

We have already instituted a bilingual policy for print materials. The Annual Report, pamphlets and brochures are being printed in both official languages and French-content newsletters are printed for designated areas. We have also started a program of upgrading the abilities of staff who already have some fluency in French and plan to expand this program to other staff members.

Last year, one staff member was placed in the Montreal Office of the Quebec Ombudsman for a period of six weeks and I am hopeful more such placements can be arranged in the future.

PARTICIPATION IN THE NATIONAL AND INTERNATIONAL OMBUDSMAN COMMUNITY

This Office, since its inception, has maintained a vigorous involvement in the national and international Ombudsman community. This has included membership in the International Ombudsman Institute, a vehicle to promote the concept of Ombudsman. Located in Edmonton, Alberta, the Institute has become a resource centre by obtaining and distributing Ombudsman information. Also, on the international scene, a conference is held every four years, the next being scheduled for 1988 in Australia. This important educational event brings together Ombudsmen from around the globe.

On the national scene, an annual conference is held by the Canadian Ombudsman Association, attended by the provincial Ombudsmen and those federal officials who serve an ombudsman-type function.

Statistical Information

Statistical Information

COMPLAINTS AND INFORMATION REQUESTS BY ORGANIZATION FISCAL YEAR 1986/87 WITH COMPARATIVE NUMBERS

ORGANIZATION COMPLAINED AGAINST	WITHIN JURISDICTION		OUTSIDE JURISDICTION		INFORMATION REQUESTS		TOTAL	
	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86
AGRICULTURE & FOOD	27	11	29	17	10	1	66	29
ATTORNEY GENERAL	42	22	77	65	37	37	156	124
Ontario Municipal Board	26	23	35	22	9	6	70	51
Public Trustee	22	22	15	9	15	8	52	39
TOTAL ATTORNEY GENERAL	90	67	127	96	61	51	278	214
COLLEGES & UNIVERSITIES	24	44	109	95	17	20	150	159
COMMUNITY & SOCIAL SERVICES	139	178	304	183	64	62	507	423
Social Assistance Review Board	36	50	33	29	6	3	75	82
TOTAL COMMUNITY & SOCIAL SERVICES	175	228	337	212	70	65	582	505
CONSUMER & COMMERCIAL RELATIONS	84	60	111	73	45	69	240	202
CORRECTIONAL SERVICES	145	68	59	18	16	25	220	111
Correctional Centres	891	806	71	61	14	49	976	916
Detention Centres	1759	1665	104	53	34	42	1897	1760
Jails	1568	1160	70	24	33	37	1671	1221
TOTAL CORRECTIONAL SERVICES	4363	3699	304	156	97	153	4764	4008
CITIZENSHIP & CULTURE	3	6	8	5	4	4	15	15
EDUCATION	39	16	30	30	5	12	74	58
ENERGY	0	2	2	4	2	0	4	6
Ontario Hydro	16	27	42	33	14	9	72	69
TOTAL ENERGY	16	29	44	37	16	9	76	75
ENVIRONMENT	11	25	47	13	11	9	69	47
FINANCIAL INSTITUTIONS	27	7	31	11	17	6	75	24
GOVERNMENT SERVICES	18	22	23	11	15	18	56	51
HEALTH	45	48	88	51	14	59	147	158
Psychiatric Hospitals	183	122	43	17	18	30	244	169
O.H.I.P.	17	21	68	35	19	18	104	74
TOTAL HEALTH	245	191	199	103	51	107	495	401
HOUSING	70	56	162	104	85	84	317	244
Ontario Housing Corp.	6	12	26	29	8	18	40	59
TOTAL HOUSING	76	68	188	133	93	102	357	303
INDUSTRY, TRADE & TECHNOLOGY	2	2	4	3	3	4	9	9
INTERGOVERNMENTAL AFFAIRS	0	0	0	0	0	0	0	0
LABOUR	70	58	91	38	55	31	216	127
Human Rights Commission	48	29	51	41	24	16	123	86
Worker's Compensation Board	352	419	687	726	539	609	1578	1754
TOTAL LABOUR	470	506	829	805	618	656	1917	1967
MUNICIPAL AFFAIRS	16	29	19	16	2	11	37	56
NATURAL RESOURCES	48	54	50	33	10	16	108	103
NORTHERN DEVELOPMENT & MINES (Northern Affairs)	2	4	5	0	4	0	11	4
REVENUE	40	29	66	40	15	18	121	87
SKILLS DEVELOPMENT	5	1	12	10	2	3	19	14
SOLICITOR GENERAL	25	40	86	56	23	16	134	112
TOURISM & RECREATION	12	13	14	10	5	9	31	32
TRANSPORTATION & COMMUNICATIONS	49	69	168	105	35	37	252	211
TREASURY & ECONOMICS	26	12	14	9	10	5	50	26
ONTARIO GOVERNMENT OTHER	2	3	27	25	156	233	185	261
ONTARIO GOVERNMENT TOTAL	5895	5235	2881	2104	1395	1634	10171	8973
COURTS	0	0	336	294	46	55	382	349
FEDERAL	0	0	947	672	188	191	1135	863
PRIVATE	0	0	3196	2395	691	542	3887	2937
MUNICIPAL	0	0	959	723	96	74	1055	797
INTERNATIONAL	0	0	7	8	3	2	10	10
OTHER PROVINCES	0	0	46	28	25	12	71	40
NO ORGANIZATION SPECIFIED	0	0	52	42	561	199	613	241
TOTAL	5895	5235	8424	6266	3005	2709	17324	14210

DISPOSITION OF JURISDICTIONAL COMPLAINTS FOR FISCAL YEAR 1986/

ORGANIZATION COMPLAINED AGAINST	COMPLAINT SUPPORTED: NO RECOMMENDATION		FORMAL RECOMMENDATION ACCEPTED		FORMAL RECOMMENDATION DENIED		COMPLAINANT ASSISTED		INDEPENDENTLY RESOLVED		UNSUBSTANTIATED	
	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86
AGRICULTURE & FOOD	0	0	1	0	3	0	3	0	1	0	10	5
ATTORNEY GENERAL			4	1			6	4	3	1	9	3
Ontario Municipal Board			2				5				11	7
Public Trustee		1		2	4	1	5	1		1	3	6
TOTAL ATTORNEY GENERAL	0	1	6	3	4	1	16	5	3	2	23	16
COLLEGES & UNIVERSITIES	0	0	0	0	0	1	8	5	1	3	2	14
COMMUNITY & SOCIAL SERVICES	1	2	2	5			19	29	8	11	20	31
Social Assistance Review Board			2	1	4		6	6	1		14	25
TOTAL COMMUNITY & SOCIAL SERVICES	1	2	4	6	4	0	25	35	9	11	34	56
CONSUMER & COMMERCIAL RELATIONS	0	0	1	0	*1	0	14	10	0	2	13	21
CORRECTIONAL SERVICES				1			8	1	16	3	1	2
Correctional Centres			4	1			65	48	49	45	3	3
Detention Centres	1				2	0	133	92	82	78	5	4
Jails							88	50	78	55	6	1
TOTAL CORRECTIONAL SERVICES	1	0	4	2	2	0	294	191	225	181	15	10
CITIZENSHIP & CULTURE	0	0	0	0	0	0	0	2	0	0	1	2
EDUCATION	1	0	0	2	9	0	3	0	0	0	15	4
ENERGY												2
Ontario Hydro	0	1					7	5		2	2	10
TOTAL ENERGY	0	1	0	0	0	0	7	5	0	2	2	12
ENVIRONMENT	0	1	0	0	0	0	5	2	0	0	2	10
FINANCIAL INSTITUTIONS	0	0	0	0	*4	0	3	1	0	1	6	5
GOVERNMENT SERVICES	0	0	0	0	0	0	8	1	0	1	5	7
HEALTH	0	0	7	0	2	1	4	3	1	0	13	21
Psychiatric Hospitals	0	1					5	9	12	9	4	1
O.H.I.P.	1	0	0	3	1	0	2	8	1	0	4	4
TOTAL HEALTH	1	1	7	3	3	1	11	20	14	9	21	26
HOUSING				1			23	11	4	0	4	5
Ontario Housing Corp.							3	3				2
TOTAL HOUSING	0	0	0	1	0	0	26	14	4	0	4	7
INDUSTRY, TRADE & TECHNOLOGY	0	0	0	0	0	0	0	1	0	0	0	0
INTERGOVERNMENTAL AFFAIRS	0	0	0	0	0	0	0	0	0	0	0	0
LABOUR	0	0	0	0	0	0	11	9	4	2	10	14
Human Rights Commission	3						1	2			19	6
Worker's Compensation Board	1	0	74	10	16	2	55	29	5	6	97	217
TOTAL LABOUR	4	1	74	10	16	2	67	40	9	8	126	237
MUNICIPAL AFFAIRS	0	0	0	0	0	0	3	2	0	1	1	8
NATURAL RESOURCES	1	0	1	0	0	0	16	7	1	2	1	9
NORTHERN DEVELOPMENT & MINES	0	0	0	0	0	1	1	1	1	0	0	1
REVENUE	0	0	2	1	0	0	6	8	0	2	7	5
SKILLS DEVELOPMENT	0	0	0	0	0	0	2	1	0	0	1	0
SOLICITOR GENERAL	0	0	0	0	0	0	4	1	1	3	1	14
TOURISM & RECREATION	0	0	0	0	0	0	5	1	0	0	3	7
TRANSPORTATION & COMMUNICATIONS	0	1	0	0	0	0	15	11	1	3	5	17
TREASURY & ECONOMICS	0	0	2	0	0	0	6	6	0	0	2	2
ONTARIO GOVERNMENT OTHER	0	0	0	0	0	0	0	0	0	0	0	0
ONTARIO GOVERNMENT TOTAL	9	8	102	28	46	6	548	370	270	231	300	495

1987 WITH COMPARATIVE NUMBERS

INVESTIGATION DISCONTINUED ABANDONED		WITHDRAWN		SECTION 18		TOTAL	
1986-87	1985-86	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86
2	2	3	2	4	2	27	11
1	1	14	4	5	8	42	22
		1	4	7	12	26	23
1	4	3	4	7	2	23	22
2	5	18	12	19	22	91	67
2	4	6	6	5	11	24	44
13	27	41	51	35	22	139	178
1	8	1	5	7	5	36	50
14	35	42	56	42	27	175	228
5	6	13	12	37	9	84	60
42	26	48	13	30	13	145	59
199	235	311	255	260	219	891	806
458	516	517	419	561	554	1759	1663
432	446	308	338	656	281	1568	1171
1131	1223	1184	1025	1507	1067	4363	3699
0	0	2	2	0	0	3	6
1	0	4	4	6	6	39	16
							2
		3	6	4	3	16	27
0	0	3	6	4	3	16	29
0	1	1	7	3	4	11	25
1	0	3	0	11	0	28	7
0	1	1	10	4	2	18	22
2	2	7	6	9	15	45	48
29	28	60	41	73	33	183	122
1	1	1	2	6	3	17	21
32	31	68	49	88	51	245	191
6	2	18	26	15	11	70	56
	3	2	4	1	0	6	12
6	5	20	30	16	11	76	68
0	0	1	1	1	0	2	2
0	0	0	0	0	0	0	0
0	3	18	10	27	20	70	58
1	6	9	5	15	9	48	29
3	15	24	48	77	92	352	419
4	24	51	63	119	121	470	506
3	1	6	14	3	3	16	29
3	10	22	21	3	5	48	54
0	0	0	1	0	0	2	4
1	3	11	6	13	4	40	29
1	0	0	0	1	0	5	1
1	5	5	5	13	12	25	40
1	1	2	2	1	2	12	13
4	8	14	14	10	15	49	69
0	0	4	2	12	2	26	12
0	0	0	0	2	3	2	3
1214	1365	1484	1350	1924	1382	5897	5235

GLOSSARY

COMPLAINT SUPPORTED

NO RECOMMENDATION — At times the Ombudsman will support a complaint but decide no recommendation is appropriate given all the circumstances.

FORMAL RECOMMENDATION ACCEPTED — Those complaints where the governmental ogranization agrees to implement the Ombudsman's recommendation.

FORMAL RECOMMENDATION DENIED — Those complaints where the governmental organization refuses to implement the Obudsman's recommendation. The discrepancy between the total number (46) and the fact that only 25 case summaries are presented in our Volume II is explained as follows: many cases are resolved between the end of our fiscal year (when our statistics are compiled) and the publication date of our report.

COMPLAINANT ASSISTED — Those complaints where the Ombudsman renders assistance and usually involve tangible corrective action taken by the governmental organization.

INDEPENDENTLY RESOLVED — Many complaints are resolved independent of the Ombudsman's involvement. This can occur at any point in the investigative process prior to the Ombudsman issuing a final report.

UNSUBSTANTIATED — Those complaints where the Ombudsman's investigation reveals no grounds to support the complainant's contention.

INVESTIGATION DISCONTINUED — The Ombudsman uses his discretion to discontinue an investigation at any point prior to issuing a final report for a number of reasons:

ABANDONED — Attempts to communicate with the complanant are unsuccessful (eg., complaints from inmates of correctional facilities who are released in the course of our investigation and leave no forwarding address).

WITHDRAWN — At the request of the complainant. In many cases information is provided to the complainant and, although there is no resolution the complainant does not wish us to pursue the matter.

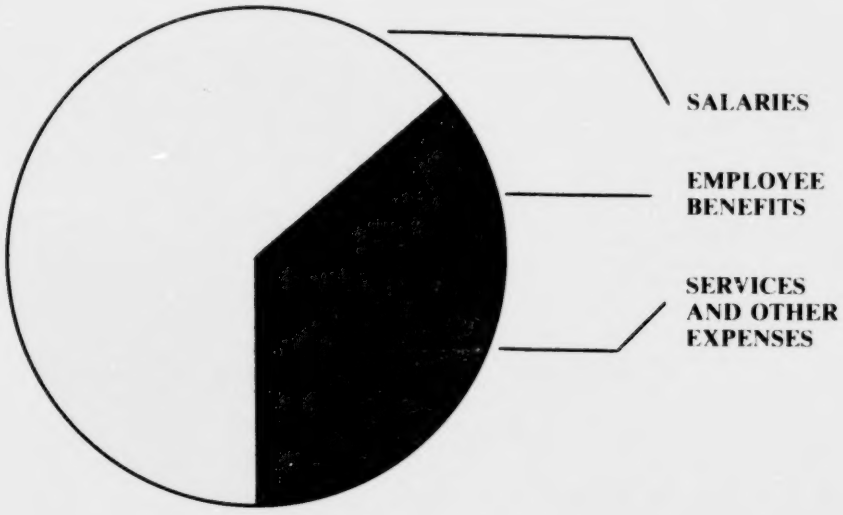
SECTION 18 — Refers to Section 18 of the **Ombudsman Act** which allows the Ombudsman the discretion to discontinue the investigation if, for example, there is an adequate alternative remedy or the complaint is frivolous or having regard to all the circumstances no further investigation is necessary.

*The 1 complaint against the Ministry of Consumer and Commercial Relations and the 4 against the Ministry of Financial Institutions were the complaints made by some 300 people and the subject of the very large Argosy investigation. My final report on the Argosy investigation has been reviewed by the Standing Committee (see page 10).

Statistical Information

DISPOSITION OF NON-JURISDICTIONAL COMPLAINTS, INFORMATION REQUESTS/SUBMISSIONS FISCAL YEAR 1986/87, WITH COMPARATIVE NUMBERS

Organization	Information Provided		Inquiries Made		No Action Possible		Total		Percent	
	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86	1986-87	1985-86
Provincial	2803	2784	1329	799	144	155	4276	3738	37.4	41.7
Federal	945	783	176	54	14	26	1135	863	9.9	9.6
Municipal	844	735	195	48	16	14	1055	797	9.2	8.9
Private	3524	2821	306	78	57	38	3887	2937	34.0	32.7
Courts & Judges	353	322	17	8	12	19	382	349	3.4	3.9
Other Provinces	57	36	13	0	1	4	71	40	0.6	00.4
No Organization Specified	532	192	33	6	48	43	613	241	5.4	2.7
International	9	10	0	0	1	0	10	10	0.1	.1
TOTAL	9067	7683	2069	993	293	299	11429	8975	100.0	100.0



ACTUAL EXPENDITURES FOR THE FISCAL YEAR 1986-87

Salaries	$4,250,010	Other Services	$146,612
Employee Benefits	657,474	Furniture & Office Equipment	24,742
Travel & Relocation	156,969	Data Processing Equipment	104,744
Telephone, Mailing & Delivery	154,806	Office Supplies & Devices	63,317
Building Rent	594,456	Books & Publications	84,496
Equipment & Other Rentals	144,870	Other Supplies & Equipment	72,702
Professional Services	70,392		

TOTAL $6,525,590

Case Summaries

INTAKE & INFORMATION

The Ombudsman tries to help even if the problem is non-jurisdictional. In the following case, financial assistance was obtained for the mother of a young child so that the mother could continue her education.

SUMMARY NO. 1

The complainants needed financial assistance for daycare for their toddler, since their income was considerably less than when the family received welfare benefits while the husband was unemployed. Although the family had passed the means test for home daycare, they were placed on a waiting list because of a freeze on these services. The grandmother was taking care of the child while the mother attended a college course in which she had recently enrolled. The grandmother was scheduled to leave in two weeks and the mother was in a state of panic when she called our Office. She feared she would have to terminate her course of study, which had been made possible through the Ontario Student Assistance Program, if she could not get financial assistance for daycare.

Our research included numerous telephone contacts with charitable organizations in the local area. It was most rewarding to learn that the local Lions Club would provide financial assistance to the complainant until the end of July 1987. Their daughter will be eligible for placement in a daycare centre in August 1987 when she turns two.

JUSTICE & LICENSING

Policy changes by governmental agencies often follow the successful resolution of an individual complaint. In the following case, the Teachers' Superannuation Commission revised its policy for the purchase of pension credits for foreign service.

SUMMARY NO. 2

This complaint concerned a teacher who, during a leave of absence from his school board for the 1980-81 school year, taught in the People's Republic of China. On returning to Ontario, he requested of the Teachers' Superannuation Commission that he be permitted to purchase credit in the Teachers' Superannuation Fund for that year of service, pursuant to the plan's foreign service provision. This request was denied, and on the basis that the service had not been performed under the auspices of the Ontario Teachers' Federation so that the Teachers' Superannuation Commission could not determine whether it was similar to service in Ontario. In this instance, the teacher had arranged his year of teaching in China with the assistance of the Chinese Embassy. The Ontario Teachers' Federation was willing to certify that the service he performed was virtually identical to that performed in one of its placements and had noted that it was not the Federation's intention that its sponsorship status be exclusive.

The Ombudsman issued his report on this case in May of 1986, concluding that the Commission's decision to deny this teacher's application for foreign service credit was unreasonable, and recommending that it now accept his application. After meeting to consider the Ombudsman's report, the Commission decided to permit our complainant to purchase pension credit for his service in China.

Subsequently, we learned that the Commission has revised its foreign service approval policy for such applications that fall within its jurisdiction. Now, the Commission will consider applications respecting service in any country outside of Canada, provided that the applicant was a qualified teacher in the jurisdiction in which the service was rendered.

In the following example, the Ombudsman's involvement ensured that administrative policies were applied uniformly by a government agency.

SUMMARY NO. 3

The complainant, who lives 255 km from Toronto, was invited for a job interview in a government office to be held at 9 a.m. The complainant was not told anything about travel expenses when she was invited for the interview. Unable to use alternative public transportation, the complainant drove her own car to attend the interview.

When the complainant submitted her expense claims for $195.50 ($170.50 mileage plus $25.00 for meals), the office refused to reimburse her, arguing that no prior arrangement had been made with regard to travel expenses.

In response to the Ombudsman's letter of intent to investigate, the government agency offered to pay $33.50, which was the cost of the most economical means of transportation. During the investigation policies regarding travel expenses as detailed in the Ontario Manual of Administration were thoroughly discussed and the government agency agreed to pay the total claim of $195.50.

Investigations can be reopened if new information comes to the Ombudsman's attention.

SUMMARY NO. 4

In 1970 approximately 2,000 property assessment officers had their employment transferred from various municipalities to the province. In the transfer process these people were faced with a choice between taking refunds from their pre-existing pension plans, transferring from those plans to the Public Service Superannuation Fund, or leaving the funds in the old plans, for payment in the form of an annuity upon reaching age 65. Approximately 250 of the assessment officers complained to this Office, contending that the manner in which their pensions were dealt with was unfair in that they had been promised that the transfer of employment would have no deleterious effect on their pensions. It is the opinion of these officers that the transfer of employment did have a harmful effect on their pensions.

In 1978, The Ombudsman's Office investigated this complaint and determined that there were no grounds for support. In 1985, the current Ombudsman reopened the investigation based on new information.

LAND USE, RESOURCES AND REVENUE

Mediation and conciliation are effective means of resolving complaints. In the following case the Ombudsman proposed a solution that was acceptable to all parties involved.

SUMMARY NO. 5

A group of residents living in a subdivision near Sault Ste. Marie, Ontario, complained that the road, sewage and water systems which serviced the subdivision had not been completed by the developer to a satisfactory standard.

Although the Ministry of Municipal Affairs and the Ministry of Environment had made some efforts to resolve the problems, the situation had become complicated by the developer's bankruptcy.

After an investigation was conducted, a meeting was arranged between officials from the two Ministries and the Ombudsman's Office to discuss possible solutions. The Ombudsman proposed that both Ministries complete certain work on the subdivision and the Ministries accepted that proposal.

The balance of the work, including obtaining title to the property occupied by the sewage system from the developer's trustee-in-bankruptcy, replacing the tile bed, and paving the road was completed during the summer and fall of 1986.

Once these problems were resolved, the residents began the formation of a Local Services Board and a Local Roads Board so that permanent mechanisms would be established to deal with services and future maintenance and repair of the road.

The investigation of an individual complaint can result in policy changes for the benefit of many others. In the following case, the Ombudsman's investigation resulted in the Ontario Housing Corporation's development of a policy that the victims of domestic violence be given special consideration when applying for subsidized housing.

SUMMARY NO. 6

Our complainant, a woman with two young children, had been physically abused by her husband numerous times. She had attempted to leave him, but was unable to do so as there was no room available for her and her children at the local women's hostels. She had also attempted to apply for subsidized housing with the Metro Toronto Housing Authority, but was advised that she could not submit an application while she continued to reside with her husband.

The abuse continued and she and the children eventually left the family home to reside in a women's shelter. She immediately applied for housing with MTHA but did not receive a home visit until three months later and was not given an offer of accommodation for another three months.

After investigating this matter, the Ombudsman wrote to the Housing Authority and to the Ontario Housing Corporation advising that he was considering three possible recommendations. The first was that a woman living in an abusive situation should be able to apply directly for subsidized housing without first having to leave that situation. The second and third recommendations stated that those who were victims of violence should be given priority in receiving home visits and, similarly, should have some priority in receiving offers of accommodation.

In response to the Ombudsman's letter, the Ontario Housing Corporation informed us that it was implementing a new policy whereby a uniform approach would be established to determine eligibility and to process applications from victims of domestic violence. Eligibility is now extended to battered women still living with their spouses. Once the battering situation has been verified by someone working with the woman in a professional capacity, and once the woman has confirmed her intention to separate from her spouse, special priority is assigned to her application for housing, and the first available and suitable unit is then offered to her. Our Office is very pleased to have been a part of the review which has led to these important changes in policy so that persons in potentially threatening situations may receive special consideration in applying for housing.

Difficulties experienced by the disabled are of special concern to the Ombudsman. In the following case the Ombudsman's involvement enabled the spouse of a physically handicapped person to obtain a refund of retail sales tax on a vehicle used for transportation.

SUMMARY NO. 7

In August of 1983, the complainant purchased a new vehicle, paying $548.80 in retail sales tax. He felt that the vehicle qualified for a tax rebate under a program offered by the Ministry of Revenue which provides a refund of retail sales tax on vehicles used for the transportation of the physically handicapped. His wife, confined to bed for most of the day, had suffered a stroke in 1974 and, in view of her disability and the vehicle's disability licence plate and parking permit, he felt that the Ministry should allow his application for a retail sales tax rebate.

In rejecting the application, the Ministry noted that two categories of individuals are entitled to retail sales tax rebates under the regulations governing this program; a person with a permanent physical handicap, or a person permanently and seriously restricted. The Ministry decided that although the complainant's wife did not meet the definition of a "person with a permanent physical handicap", she did qualify as "permanently and seriously restricted" in personal mobility. The relevant regulation provides for a rebate to a family member of the person with a permanent physical handicap but does not provide a rebate to a family member of a person whose personal mobility is permanently and seriously restricted.

After receiving notification of our intention to investigate, the Ministry of Revenue acknowledged that the vehicle could have been registered in the complainant's wife's name, in which case the rebate would have been granted. The Ministry agreed to a rebate to the complainant of his retail sales tax payment of $548.80. In addition, the Ministry indicated that the regulations in question were being reviewed in conjunction with the Secretariat for Disabled Persons, to better serve disabled persons and their families.

Governmental organizations often change their decisions when additional relevant information is provided. In the following case, the Ombudsman provided information that convinced the Ministry of Natural Resources to protect the cabins and timber resources of a remote Native Band.

SUMMARY NO. 8

The Chief and Councillors of a remote northern reserve complained to the Ombudsman about the Ministry of Natural Resources' fire-fighting policy north of the 50th parallel.

The Chief was of the view that the Ministry did not assign any value to the resources in the vicinity of the reserve and would only fight those forest fires which were threatening the community itself. The Chief was dissatisfied with this policy and pointed out that his trap line had been burned two years earlier. As a result, he was not able to take his annual quota of furs.

He also pointed out that trappers' and hunters' cabins were not protected in the event of fire and that their loss could pose a serious financial setback to the owners. Finally, he expressed the wish that more members of the community be trained in fire-fighting and, that fire-fighting equipment be placed on the reserve.

A review of this matter by our Office revealed that Ministry policy dictates that forest fires in the far north will be fought only if it can be done on a cost-efficient basis. The Ministry felt that it could not justify spending amounts of approximately $25,000 per day in order to protect what it believed were relatively worthless timber stands. However, when it learned that the Band was concerned about protecting its cabins and a particular timber stand which it hopes to utilize when a sawmill is built, the Ministry indicated that it would be willing to undertake to protect these resources in the event of fire.

With respect to the concern about fire-fighting training and the stationing of fire-fighting equipment on the reserve, the Ministry undertook to provide more fire-fighting training to communities in that area and to review its fire-fighting policy north of the 50th parallel. It is hoped that this review would be completed by the summer of 1987.

The Band accordingly notified our Office that it would await the outcome of this review. It also indicated that it was satisfied that the Ministry had undertaken to protect the cabins and timber stands which, in the Band's opinion, constituted valuable assets.

Often complaints are resolved when the governmental organization agrees to review the complainant's file. In the following case the Ombudsman assisted a single mother with two children to obtain a transfer to accommodation closer to her school from the local Housing Authority.

SUMMARY NO. 9

The complainant was a single mother with two children who applied for a housing transfer so she could live closer to the college she planned to attend the following year. Although she presented the local Housing Authority with a letter from the Office Manager of the College confirming that she had submitted an application, the Housing Authority denied her transfer request.

The Housing Authority's procedures required that a tenant be enrolled in a course before a transfer request could be considered. This procedure was followed to ensure that all such requests were current and valid.

It was not until the complainant was actually attending classes that her transfer request was approved. She was then placed on a long waiting list and after a year at school she had not received a transfer to suitable housing.

The complainant advised us that she was trying to become self-supporting by taking a very difficult course and she was required to take a full course complement in order to qualify for subsidized daycare. As a result of the long hours of travel (1-1/2 to 2 hours each way) and the demands of caring for her family, she said she had to drop one course. She felt that the Housing Authority could have prevented her difficult situation had it approved her original transfer request. She complained that the Authority's procedure requiring a tenant to be enrolled in a course before approving a transfer was unreasonable.

In the course of our investigation, the Housing Authority agreed to review the complainant's file. As a result of that review, the Housing Authority agreed to consider her for upcoming vacancies on a priority basis. We were also advised that the Authority was undertaking a complete review of its transfer policies.

The Ombudsman will support a complaint when the government decision was based on a mistake of fact. In the following case the Ombudsman helped the complainant recover more that $9,000 in taxes as a result of an erroneous property assessment.

SUMMARY NO. 10

The complainant alleged that the Ministry of Revenue had, through its errors in assessing property owned by his company, caused the company a financial loss.

The investigation revealed that the building was first assessed in 1977, shortly after construction. When the complainant purchased it in November of 1979, the offer to purchase was based on projected income and expenses, including property taxes for which an annual average increase of 8% was allowed. Two years after the purchase, the Ministry reinspected the property and found that approximately 2,500 square feet of space had not been assessed.

When this was corrected, the assessment increased by more than $30,000. The complainant alleged that as a result of the Ministry's error, his company had suffered financially due to the unanticipated increase in property taxes. The Ministry of Revenue did not dispute that the error had been made, but since it was obliged to correct the error in order to ensure the fairness of the assessment, it felt it ought not to have to compensate the complainant.

While in the purchase and operation of an income generating property there are certain inherent risks, the Ombudsman felt that prospective purchasers should not reasonably be expected to accept, as a valid business risk, errors made by the Ministry of Revenue in assessing property. The complainant had relied on the assessment as being correct and projected property taxes on that basis. When the assessment increased as a result of the Ministry's correction of its error, the property taxes increased accordingly, causing an unanticipated increase in the operating expenses of the building. Depending on revenues and other costs, this would have either increased the loss or reduced the profit. On this basis, the Ombudsman reached a possible conclusion that the Ministry of Revenue's assessment was based on a mistake of fact and tentatively recommended that the Ministry provide appropriate compensation. The Ministry disagreed with this position, pointing out that no member of its staff had represented to the complainant that his property assessment would remain unchanged. It also stated that the inaccuracies of the projected tax liability were attributable to the complainant's own incorrect assumptions concerning the application of **Assessment Act**, since the possibility of increased assessment is implicit in the Act.

It was felt, however, that if there was an incorrect assumption on the complainant's part, it was that the assessment was correct. Also, the complainant's assumption that the two year old assessment was correct and equitable was not unreasonable, since property owners must be able to rely on property assessments as being correct and having some meaning in relation to property taxes. Since the assessment increases which occurred were not found to be reasonably acceptable risks and were the result of corrective measures taken by the Ministry to rectify its previous errors, a final conclusion was made that the Ministry's assessment was based on a mistake of fact and a final recommendation was made that the Ministry pay compensation for the effects of its errors.

In response to the final recommendation, the Ministry of Revenue obtained from the municipality detailed information as to the amount of the taxes in question and issued to the complainant a cheque for more than $9,000.

LABOUR AND PSYCHIATRIC INSTITUTIONS

For decisions to be seen as fair, all relevant information must be considered. In the following case, the Workers' Compensation Board accepted the Ombudsman's recommendation that an ongoing supplement and arrears be paid an injured worker who had suffered a reduction in wages because of a compensable injury, on the basis of available information not considered by the Board.

SUMMARY NO. 11

In February, 1981, an upholsterer twisted his right arm and struck his elbow, incurring an injury requiring time off work. He returned to work half days in April and began receiving temporary partial disability benefits. In June, 1981, his orthopaedic specialist notified the Board that, because of the compensable injury, the worker's piecework production was low and consequently he was suffering a wage loss. When the employer disagreed, taking the position that earnings were reduced because economic conditions dictated a decrease in the number of hours worked, benefits were discontinued, except for a 5% pension. The worker objected, claiming that his hours of work had been cut back because of business slowdown, but that when at work his production was low because of his injury. He felt that he should be given entitlement to a supplement to make up his wage loss.

The employer provided the Board with a breakdown by week of the hours worked, gross wages and time off. Although Board staff did not analyze the figures, the Appeal Board decided that there was no evidence to substantiate a wage loss, and that the 5% pension was adequate recognition of the worker's decreased ability.

After the worker complained to this Office, we looked at the employer's figures for the 12 months preceding the accident as a baseline against which other figures could be compared, and for two later years when the worker had returned to full-time employment. In order to exclude the effect of business slowdown, we examined the worker's average wage per hour rather than gross wages.

We found that his average wage per hour was $8.95 before the accident and $8.41 afterwards, $8.93 with the 5% pension added. We contacted the employer and discovered that raises in pay negotiated in union agreements would have increased the worker's earnings per hour to $10.54 and $11.07 in the two later years, had he been able to work at his former rate. When we applied these rates to his hours worked, it showed that he earned about $5,000 less in the two years than he would have earned had he not been injured.

We felt that the figures adequately demonstrated that the worker suffered a significant wage loss, not adequately compensated by the 5% pension, and recommended that the Board pay him a supplement.

After receiving the Ombudsman's recommendation, the Board reviewed the earnings figures, and paid the worker both an ongoing supplement and arrears for the five years he had suffered a reduction in wages because of his compensable injury.

In the following case the Ombudsman's recommendation, that the preponderance of medical evidence supporting the complaint be accepted over the opinion of a surgical consultant who did not examine the worker, was accepted by the Board.

SUMMARY NO. 12

The worker had been employed on an automobile assembly line for a number of years when he suffered a compensable right shoulder strain at work on April 14, 1980. He returned to work approximately one month later. In July, 1981, he began performing overhead work tightening bolts and developed arthralgia of his right shoulder, which the Board accepted as disablement arising out of and in the course of his employment. After being advised by his doctors that he was ready for modified work, the worker agreed to try a job which the company felt would be suitable. On May 13, 1983, after three days at work, he was not able to continue due to severe shoulder pain. After examination, his doctors stated that he was unable to perform even light duties.

In spite of the fact that the Board's rehabilitation counsellor viewed the job and expressed her opinion that different work might be less strenuous on the worker's shoulder, the surgical consultant at the Board stated that the worker was fit to do the job described. On the basis of this opinion, the worker was denied entitlement to temporary total disability benefits after May 13, 1983.

Subsequent medical treatment improved the worker's condition so that, on November 21, 1983, he was able to return to active employment and to remain employed. Later, he was given a 5% permanent disability award for right rotator cuff tendinitis.

Both the family doctor and the specialist wrote to the Board stating that the worker had been unable to work from May to November, 1983 because of his right shoulder pain. In its decision of November 27, 1984, however, the Appeal Board accepted their surgical consultant's opinion that the worker had been fit to perform the work offered in May of 1983 and denied his claim. As well, the panel concluded that the worker had not made a sincere effort to find work and that the preponderance of medical evidence did not support a claim of total disability subsequent to May 13, 1983.

On reviewing the documentation, we found that the Board's surgical consultant had never examined the worker. The worker's own treating physicians were unanimous in the opinion that he had been totally disabled during the period in question while he had been receiving active treatment. It was our opinion, therefore, that the surgical consultant's assessment of the job and the worker's ability to perform it should not have prevailed over the opinions of the counsellor who viewed the work and of the treating physicians. It was also noted that the worker had contacted his company for a suitable job whenever his doctors had authorized his return to work. He had performed his job in May, 1983 for three days and part of a fourth before becoming disabled by his shoulder pain. His effort, therefore, did appear to have been adequate. On the basis of the evidence, it was concluded that the Appeal Board decision had been unreasonable and we issued a report recommending that the worker be awarded temporary total benefits from May 13 until November 21, 1983.

Upon reconsidering this case, the Board revoked the decision of the Appeal Board and accepted that the preponderance of external medical reporting supported total disability for the period claimed.

A psychological disability can often emerge after an accident in the workplace and render the worker completely disabled. In the following case, the Ombudsman persuaded the Board to grant the worker an attendance allowance for ongoing care in the home.

SUMMARY NO. 13

In February of 1967, a factory worker twisted her back while lifting a load of leather. Surgery was performed in May of that year.

Benefits were paid at various levels from February 1967 until August of 1969. At that time, a 30% permanent pension was granted in recognition of the ongoing physical disability. It was not until April 1973 that another 15% was granted, this in recognition of ongoing psychiatric problems. Over the years, the psychiatric and organic amounts were gradually increased until, in 1980, the worker received a 100% award: 40% psychiatric and 60% organic.

The worker approached the Ombudsman's office, seeking the backdating of her 100% pension to 1969, i.e., to the date her temporary benefits were terminated, and requesting entitlement to an attendance allowance. (Attendance allowances are granted to assist workers in receipt of 100% pension with respect to their ongoing care and needs in the home.)

During the course of the investigation, new medical opinions were sought from the worker's treating physicians and an independent assessment of the worker's in-home needs was conducted by the Victorian Order of Nurses. A member of our staff also interviewed the worker twice at great length, once at her home in the presence of her daughter and sister, both of whom had cared for the worker and her household for many years.

It was concluded on the basis of the medical evidence, all of which dated the emergence of a psychiatric disability from the accident onwards and none of which refuted that assertion, that the worker did not suffer a pre-existing psychiatric condition. Further, it was noted that all medical evidence attributed the majority of the worker's disability to psychiatric factors. It was recommended that the 100% award should be redistributed as follows: 30% for the physical disability and 70% for the psychiatric disability, and that the award should be backdated to August of 1969.

Our review of the worker's request for entitlement to an attendance allowance revealed that the worker did not fall within any one of the seven categories covered by the Workers' Compensation Board policy on attendance allowances. However, it was concluded that the policy was improperly discriminatory in two respects: 1) there was no mention of psychological disability in any of the seven categories of eligibility; 2) the policy failed to address what could be described as quality of life issues, i.e., shopping, food preparation, cleaning and care of the home environment, et cetera. Given the lack of restrictions prescribed in section 52 or the **Workers' Compensation Act**, it seemed that the policy should be amended to broaden the eligibility requirements.

It was suggested that, if the Board accepted redistribution of the 100% pension, so that more weight was given to the psychiatric component of her disability, then in considering the worker's entitlement to an attendance allowance the worker's perceptions of her abilities and restrictions would be taken into account as well as her physical abilities and restrictions. It was found that the worker believed herself to be totally disabled and incapable of caring for herself or her home, in sharp contrast to her singlehanded management of the household prior to the accident. Given that the worker's daughter and sister have since attended to all these matters, the worker would in fact be rendered helpless without their assistance.

Following the issuance of the final report, the Board accepted the Ombudsman's recommendation. In the result, a retroactive adjustment to the 100% pension was made effective August of 1969, and entitlement was granted to an attendance allowance effective July, 1985. The Board policy with respect to the payment of attendance allowances was referred to the Medical Services Division for review, based on our Office's findings.

Disablement arising out of and in the course of employment can be difficult to establish. In this case, the Ombudsman found that the worker's wrist disability was a direct result of a significant increase in production over a short period of time, which led to an unaccustomed strain.

SUMMARY NO. 14

In November of 1981, a worker began employment as a spray painter at a car assembly plant, painting approximately 70 cars per shift.

By the middle of December, the production line had increased to approximately 200 cars per shift and the worker began to experience pain in his right wrist. Tendinitis of the wrist was diagnosed which the worker hoped would resolve during the seasonal shutdown from December 22, 1981 to January 18, 1982. Unfortunately, when he returned to work, he found he could not continue with the job due to the pain in his wrist, and laid off work the following day.

The claim was initially allowed by the Workers' Compensation Board for a period of temporary total disability, but on appeal for continuing entitlement the allowance was overturned, the entire claim denied and an overpayment in excess of $10,000 was created.

During our investigation, we notified the Board that it appeared the worker should have entitlement for right wrist disability, arising out of and in the course of his employment. We noted that there was a significant increase in the production line which would give rise to any unaccustomed strain and, therefore, quite reasonably to disablement arising out of and in the course of employment, and that this was supported by the consensus of medical opinion. It was tentatively recommended that the worker be granted entitlement for a right wrist disability with temporary total disability benefits being paid up to August 16, 1983, when the Workers' Compensation Board surgical consultant found no existing organic disability.

The accident employer responded by indicating that it did not consider the increase in the production line to be significant and felt that, as the worker had experience with spray-painting automobiles in a body shop over a four-year period, the wrist disability could not be considered a result of unaccustomed strain. As no response to our tentative conclusion and recommendation was received from the Workers' Compensation Board, we determined that a reasonable amount of time had passed for the Board to respond. In the final report, it was noted that the increase in the production line was sufficient to give rise to unaccustomed strain, and that such a causal connection was supported by the medical opinions available. Spray painting in a body shop neither corresponded with spray painting on a production line, nor spoke to the issue of a production line that was increased from approximately 70 cars per shift to over 200 cars per shift.

The report concluded that the Appeal Board decision complained of was unreasonable in not accepting the worker's right wrist disability as being the result of an accident or as disablement arising out of and in the course of his employment, and recommended that entitlement be granted for the right wrist disability, with benefits being paid to the August 16, 1983 date.

Following receipt of the final report, the Committee to Review Appeal Board Decisions reconsidered the Appeal Board decision and by letter of September 4, 1986, we were advised that the Board had rescinded the overpayment and further benefits were to be processed in recognition of the worker's right wrist disability arising out of and in the course of his employment.

Accidents at the workplace often aggravate pre-existing conditions. In the following case, the Ombudsman obtained additional medical evidence to convince the Board that a causal relationship existed between the accident and a pre-existing problem.

SUMMARY NO. 15

In 1981 a sewing machine operator fell and sustained what initially presented as a knee injury. When, some three months later, the knee cleared, it became apparent that she had developed a serious hip problem. Her physicians postulated that the mechanics of the knee injury aggravated a pre-existing hip osteoarthritis. The Workers' Compensation Board, however, refused to recognize a causal relationship on the basis that hip problems did not appear until 1983.

On the strength of existing medical evidence, the Ombudsman tentatively argued that entitlement for a hip disability should have been granted on the basis of an aggravation of a pre-existing condition. The Board responded that it disagreed with that tentative conclusion and recommendation, having obtained the opinion of its medical consultant who argued that the claimant's continuing hip pain was related to the slowly progressive osteoarthritis and not to the transient soft tissue injury to the knee.

Because we were not persuaded by the Board's response, further consultation was conducted with the worker's treating specialist and a medical opinion clearly in her favour was obtained.

After considering this final submission, including the new medical evidence, the Board accepted the Ombudsman's recommendation that entitlement for a hip disability be granted. As a result, the worker was awarded temporary total disability and health care benefits for approximately three years. Also, the Board agreed to assess the claimant for a permanent disability rating in due course.

The Ombudsman will persist until a valid complaint is rectified.

SUMMARY NO. 16

A mechanic employed at a truck repair centre first complained in 1981 to the Ministry of Labour, Occupational Health and Safety Branch, about the poor quality of the air in his workplace. He complained of high carbon monoxide levels and that the ventilation system was inadequate, due primarily to the lack of flexible hoses for use on exhaust pipes. From 1981 to 1984, Ministry officials attended at the workplace and conducted a series of tests. The complainant was not satisfied with the results of the tests and complained about the manner in which the tests were conducted. Unhappy with the actions of the Ministry, the complainant contacted our Office in March of 1984. Ministry officials then attended at the workplace and conducted a further series of tests. The Ministry, on the basis of these tests, concluded that the air quality at the workplace was not a hazard to the workers and determined that the exhaust system was "Not inadequate".

We persistently brought the concerns of the complainant to the Ministry and finally, in November of 1986, Ministry officials issued an order for the company to install flexible hoses for use on exhaust pipes. The complaint was resolved because the complainant's concerns had finally been addressed by the Ministry officials.

CORRECTIONAL SERVICES

The Ombudsman's investigation resulted in an inmate's receiving medical appliances to alleviate the discomfort of a physical disability.

SUMMARY NO. 17

This inmate submitted a letter to our Office from a provincial detention centre, complaining about a difficulty he was having in securing appropriate footwear while in the detention centre.

Approximately five years prior to this incarceration, the inmate was involved in a motorcycle accident, causing severe disfigurement of his ankle and calf, resulting in him having to wear orthopaedic shoes. The inmate claimed that he had orthopaedic shoes, but had taken them into a shoe repair shop; in the meantime he was incarcerated. During the first couple of months of his incarceration, he discussed his concern with the medical staff and institutional social worker. He had hoped the institution would be able to retrieve his orthopaedic shoes from the shoe repair shop. The inmate indicated that in the meantime he was wearing institutional shoes in which he was unable to walk. The inmate was unable to get anyone in the institution to take action to resolve his dilemma either by obtaining his own orthopaedic shoes from the repair shop or by providing him with another pair of orthopaedic shoes.

When our Office commenced our inquiry into this concern, we found that no one at the institution had contacted the shoe repair shop or had alternatively decided to provide him with new orthopaedic shoes. After the problem was discussed with the Superintendent, he agreed to resolve the complainant's concerns.

A subsequent inquiry with the Deputy Superintendent revealed that although the institution had not been able to locate the inmate's own orthopaedic shoes, he had been sent to be fitted for a new pair of orthopaedic shoes, valued at approximately $400.

In this case, the Ombudsman's investigation resulted in financial compensation to an inmate whose personal property was damaged during an institutional search.

SUMMARY NO. 18

A portable stereo was purchased for the inmate and brought to the institution to be placed with the inmate's property. While the institution accepted the portable stereo for placement in the inmate's property, the institutional officials suspected that the stereo was being used to conceal contraband drugs. Therefore, with the assistance of the local police, the stereo was searched. This resulted in some damage to the unit. When no contraband was found, the stereo was placed back in the inmate's property in a dismantled state. Shortly thereafter, the inmate and his property were transferred to a federal institution.

Upon his arrival, the inmate learned that the provincial institution had tampered with his stereo. The inmate corresponded with the Minister of Correctional Services but was unsuccesful in his attempt to have the Ministry replace the stereo or refund the purchase price.

The inmate contacted our Office with his complaint. After assessing the complaint, the Deputy Minister of Correctional Services notified our Office that a cheque had been forwarded to the inmate in the amount of $206., compensating the inmate for the full purchase price of the portable stereo.

Although this complaint arose in a privately administered facility, the Ombudsman's investigation resulted in a change in local policy to ensure that inmates would be treated in accordance with general Ministry policy.

SUMMARY NO. 19

On July 23, 1987, the complainant contacted our Office to lodge a complaint against a Community Resource Centre. She alleged that while her brother was residing at this half-way house, she was unable to visit him because the policy of the Community Resource Centre precluded visitation by siblings. This policy stipulated that only parents or girlfriends of inmates were allowed to visit. The rationale given by the Director of the half-way house for this policy primarily related to size of the visiting room and problems encountered by staff when other inmates' siblings had previously visited. The complainant's contention was that the Community Resource Centre's policy regarding sibling visits was unreasonable.

When we contacted the Ministry of Correctional Services for its reponse, the Ministry stated that as the Community Resource Centre was an agency funded by the Ministry, the same rules of visitation that apply to Ministry jails and detention centres and correctional centres should apply to Community Resource Centres.

The Ministry agreed with our position that a Community Resource Centre cannot restrict certain individuals from visits by virtue of their relationship to the inmate.

Consequently, the Centre was required to change its policy and allow siblings visitation rights with inmates at that Centre.

A case of mistaken identity which could have led to the complainant's being illegally incarcerated was resolved by the Ombudsman's investigation.

SUMMARY NO. 20

An inmate in an Ontario detention centre wrote to our Office indicating that he had been transferred to that location from a Ministry correctional centre, in order to appear in court on outstanding criminal charges. He stated that he had no outstanding criminal charges. He wished to be transferred back to the correctional centre, and asked our Office to review his allegation that he had no outstanding charges.

Our investigation revealed that the inmate's complaint was well founded. Specifically, there were outstanding criminal charges for a person with the same name as the complainant, but with a different date of birth. A check with the Inmate Records office at the detention centre revealed that these charges were dealt with in court, and the person was convicted. This information was erroneously placed on the inmate's Ministry of Correctional Services file at the institution. When the case of mistaken identity was brought to the attention of institutional authorities by our Office, the documentation of the inmate's file was rectified and the erroneous conviction and sentence were deleted from the inmate's file.

Further inquiries by our Office regarding this complaint revealed that the complainant was transferred back to the original institution eight days after he was interviewed by our investigator.

The Ombudsman's involvement in the following case resulted in the improvement of the procedures used for calculating the interest on monies held in trust for inmates by Superintendents of correctional facilities.

SUMMARY NO. 21

Four inmates who were serving their sentences at a correctional centre contacted the Ombudsman complaining that the Ministry of Correctional Services failed to credit them with the interest earned on their monies held in trust by the Superintendent.

All money earned by inmates at the Correctional Centre for work performed was held in trust for them and the money was deposited into a single trust account at a local Province of Ontario Savings Office. The interest earned on each inmate's money was not credited to each inmate. Rather, the interest was credited to a separate account called the "Cheer Fund" and used for the benefit of all inmates in the institution. For example, this fund was used to pay for movies shown in the institution, and to purchase refreshments and prizes for sports events.

When we began our investigation, the Ministry indicated that the Superintendent deposited and held all money earned by the inmates in the institution pursuant to the **Ministry of Correctional Services Act**, and that it would be impractical from an administrative point of view to have separate accounts for each inmate or to attempt to calculate the interest accrued to each individual. The Ministry further indicated that it was a privilege for inmates to be allowed into the community to work and earn money and, therefore, it seemed appropriate that they contribute to the benefits enjoyed by all, including those inmates who are not allowed the privilege of earning money.

The results of legal research by our Office revealed that there was no statutory or regulatory authority for the use of the interest on inmates' trust accounts in the manner followed by the Ministry. Furthermore, it appeared that the Superintendent or the Ministry stood in the relationship of trustee to the inmates with respect to these monies, and, as, such, was under a duty to invest the trust funds and hold any income from the corpus in trust as well.

As a result, the Ombudsman reached the tentative conclusion that the correctional centre's omission to credit the complainants individually with the interest earned on their trust accounts was contrary to law. Accordingly, we recommended that the correctional centre repay the complainants the interest that accrued on their trust accounts and that the Ministry of Correctional Services alter its practice to ensure that henceforth, interest earned on inmates' trust accounts is credited to individual inmates.

As a result, the Regulations made under the **Ministry of Correctional Services Act** have been amended effective October 1, 1986. The regulation now provides than an inmate shall be credited with simple interest on his trust monies if the amount of money held in trust for the inmate exceeds $100. through a quarter.

The procedures for calculating the interest on monies held in trust for inmates by the Superintendents were distributed to the Superintendents in October, 1986.

Through the Ombudsman's presentation of this issue to the Deputy Minister of Correctional Services, a significant policy change occurred guaranteeing administrative fairness for inmates in their dealings with senior Ministry officials.

SUMMARY NO. 22

An inmate in an Ontario correctional institution complained that the policy contained in the Ministry of Correctional Services' Manual of Standards and Procedures regarding official replies precluded him from receiving a copy of several replies to letters that he had directed to Main Office Ministry officials regarding his classification. The policy allowed for replies to be directed to the Superintendent of the institution. The Superintendent was advised to allow the inmate to read the letters and then have the inmate sign the letters acknowledging that he had read the Ministry's response. It was the complainant's view that since he was responsible for initiating the inquiry which in turn prompted a reply from Ministry officials, he should at least be afforded a copy of any intended reply to his inquiries. The complainant felt the Ministry's policy denied him an adequate opportunity to assess the content of the written reply and reponse if he had any further questions. In addition, the complainant felt that if he had directed the letters regarding his incarceration to the Ministry officials following his release, he would receive a written response, and therefore, he could see no valid reason why he should not receive direct responses while in custody.

After we notified the Deputy Minister of Correctional Services of the above complaint, he assembled a committee to review this Ministry policy. As a result of the review, a Directive was issued to all Superintendents informing them that inmates would now receive direct written responses to their inquiries from senior Ministry staff, and a copy of the reply would be sent to the Superintendent of the institution.

SOCIAL BENEFITS

The learning disabled have special needs. In the following case the Ombudsman's recommendation prompted the Ministry to provide partial funding for the attendance of a severely learning disabled child at a school in the United States.

SUMMARY 23

The complainants contacted our Office with a complaint against the Ministry of Community and Social Services and the Social Assistance Review Board. They were dissatisfied with the decision of the Director of Vocational Rehabilitation Services (VRS) to deny them special education funding for their son's attendance at a private school in the United States. They were also dissatisfied with the Review Board's decision to uphold the Director's decision.

The complainants' son was a severely learning disabled child. He was eligible for funding for private education in 1982/83 and 1983/84 because his local school board could not provide an appropriate educational program that would meet his special needs.

The Director of VRS had also approved funding for the complainants' son to attend a private school in the 1984/85 school year. However, when the parents decided to enrol him in a private school in the United States, Ministry funding was withheld.

The parents applied to a special Review Committee for VRS/LD Placements which was set up to ensure that students whose needs were of a highly specialized nature were placed in appropriate educational settings during 1985/86. The Review Committee advised us that the parents were not eligible for a review because they had not received funding in 1984/85.

In the course of our investigation, we confirmed that the complainants had been granted funding for their son's schooling in 1984/85, although no money was actually paid.

The Ombudsman tentatively concluded that the decision of the Ministry of Community and Social Services to deny the complainants partial funding under the **Vocational Rehabilitation Services Act** and Regulations was unreasonable, and he tentatively recommended that the complainants be reimbursed an amount equal to the amount it would have cost the Ministry for placement at a private school in Toronto.

Secondly, it was recommended that the Ministry of Community and Social Services immediately notify the Review Committee for VRS/LD Placements of the complainants' son's eligibility for a review so that a hearing could be scheduled before the Committee disbanded.

The complaint was considered resolved when the Ministry of Community and Social Services agreed to provide the complainants with partial funding and when the Ministry of Education agreed to authorize the Review Committee for VRS/LD Placements to review the complainants' son's placement application for the 1985/86 academic school year.

Often a complainant has misunderstood a request for particulars from a Ministry. In the following case, the Ombudsman was able to clarify what OHIP required to process a claim and expedite processing of the claim.

SUMMARY NO. 24

The complainant contacted the Ombudsman because OHIP had rejected the documentation she had submitted of her visit while on vacation to a hospital in the United States to obtain care for a foot injury. The documentation consisted of a statement for $19.00 for radiological services, a copy of her hospital registration, a handwritten breakdown of the hospital charges from the admissions clerk, and a receipt for the $100.00 U.S. that she had paid the hospital. A notice from OHIP led the complainant to believe that an itemized invoice for the $19.00 charge was required. Her letter to the radiological facility requesting an invoice went unanswered and she did not see how to satisfy OHIP's request for particulars.

Our office contacted OHIP to find out what documentation they would accept. OHIP clarified that the $19.00 charge had been accepted, but that the hospital charges required an itemized invoice under the hospital's letterhead. As the complainant sent her letter to the wrong facility, our Office sent her request for an itemized invoice on to the hospital, which resulted in her prompt receipt of the required invoice. After submitting this information to OHIP, the complainant was reimbursed in full.

Informal inquiries often are enough to resolve a complaint. In the following case a substantially reduced overpayment was obtained for the complainant without the need for a formal investigation.

SUMMARY NO. 25

The complainant contacted the Office of the Ombudsman with a complaint against the Ontario Student Assistance Program (O.S.A.P.) after he had unsuccessfully appealed an Ontario Study Grant overpayment of $940.00. The fact that his father incurred unrelated legal expenses during the year in question was the cirtical factor in his appeal. He argued that legal expenses should reduce the expected parental contribution. In reply, O.S.A.P. explained that legal expenses could only be viewed as extraordinary expenses with regard to loans, not grants. This position was contrary to the advice the complainant was given by an O.S.A.P. official when he first inquired about the grounds for appeal.

We were informed by O.S.A.P. that at the time O.S.A.P.'s reply was sent to the complainant, the legal expenses were only a factor with regard to student loans. However, that policy had subsequently been changed to include both loans and grants.

The question remained whether the new policy was retroactive.

Since the complainant had not fully documented the legal fees in question, it was suggested that he submit another appeal. This time he was advised to include full documentation of all legal expenses.

The new appeal resulted in O.S.A.P. reducing the overpayment to $470.00 from the original $940.00. O.S.A.P. explained that the decision was made on compassionate grounds. Retroactive application of the policy change was accepted by O.S.A.P. and the complainant was delighted by the outcome.

Sometimes a complainant will seek flexibility in Ministry policy because of reasons personal to that individual. In the following case, the Ombudsman was able to make those reasons known to the Ministry, and the Ministry agreed to proposed arrangements to repay an outstanding debt.

SUMMARY NO. 26

The complainant contacted the Ombudsman in December, 1986, becuase he had been advised by the Ministry of Community and Social Services that arrears were owing to him in the amount of $234.00 and would be applied against an overpayment which he owed the Ministry. He wanted the amount of arrears paid out to him as a lump sum, with deductions being made from his Family Benefits Allowance for the overpayment (at a rate which had been previously established) to continue. He believed this arrangement would ease his difficult financial circumstances.

Our Office contacted the Ministry and it was confirmed that the Ministry's policy was to apply arrears against outstanding overpayments to reduce the debt owed to the Ministry. After further discussion, the Ministry agreed that the complainant could receive a lump sum payment as long as the complainant understood that the overpayment amount would remain and deductions would continue. The complainant accepted this and had money for Christmas.

RECOMMENDATION DENIED CASES

In the second volume of my annual report for this year, I am reporting 25 cases in which the governmental organizations involved have refused to implement my recommendations.

Five of these cases involve complaints of parents against the Ministry of Education concerning the refusal of funding for the special education of their children.

In two of the cases I have recommended compensation for inmates who suffered physical injury in a provincial institution in a situation in which, in my view, the authorities did not take reasonable care to prevent such an occurrence.

Three cases involve the refusal of the Ministry of Agriculture to satisfy claims of goat's milk producers against the Milk Commission of Ontario arising out of the financial collapse of a local processing plant.

In another case, I have recommended that the Ministry of Health recognize the claim of a homosexual couple to dependent status for the purpose of payment of OHIP premiums.

Four cases involve recommendations for payment of compensation or reduction of administration costs to complainants whose affairs where handled by the Public Trustee in a manner which I found to be unsatisfactory.

Finally, the Workers' Compensation Board has refused to implement recommendations in ten cases which I have decided to report to the Legislature. Four of these involve entitlement to benefits, two involve hearing loss claims, and one deals with the manner in which the Board calculates the wage basis used to determine the temporary benefits payable.

Detailed summaries of all of these cases appear in Volume II of my report.

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Volume

2

THE OMBUDSMAN OF ONTARIO

ANNUAL REPORT
1986-87

VOLUME II

INTRODUCTION

Volume II is devoted entirely to detailed summaries of cases where the recommendation of the Ombudsman was denied by the governmental organization.

Tables of recommendations outstanding from previous reports are included as appendices.

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DETAILED SUMMARY NO. 1

On June 3, 1983, Mrs. J sent to this Office an account of the circumstances regarding a dispute with the Milk Commission of Ontario. Mrs. J complained that the Milk Commission of Ontario had unreasonably rejected her claim for compensation made against the Fund for Milk and Cream Producers. On July 5, 1983, the Commission met Mrs. J and a number of other milk producers to discuss their claims against the Fund arising out of the financial collapse of a local processor of goats' milk. At this meeting the Commission indicated that the records obtained from the processor were inadequate for settling some of the claims. Ms. N apparently undertook to obtain fuller records from the owner of the processing facility. However, Ms. N subsequently discovered that the records she had hoped to produce were already in the Fund's possession.

Accordingly, on March 15, 1984, my Office wrote to Mr. J.C. McMurchy, then Chairman, Farm Products Marketing Board, notifying him that we intended to investigate the complaints brought by Mrs. J and Ms. N. Mr. McMurchy was asked to comment and he replied by letter dated May 24, 1984. Shortly thereafter, an investigation began. After the investigation was underway, Mr. and Mrs. O and Mr. P filed similar complaints against the Commission. On October 11, 1984, we notified the Commission of our intent to investigate these complaints.

Mr. and Mrs. J, Ms. N, Mr and Mrs. O and Mr. P were producers of goats' milk who shipped their product to the processor. The processor collapsed financially and failed to pay producers for milk delivered in June, July, August and September, 1982. The producers discovered that the Fund for Milk and Cream Producers was established in order to protect producers of milk and cream against any loss through default in payment by a processor. They submitted claims to the Fund for reimbursement of the processor's defaulted payments.

The Fund rejected all the claims on the grounds that the claims had been filed late (all the claims), an arrangement existed between the claimants (the Js and Mr. P) and the processor whereby time in which payment became due was extended, and the claims by Ms. N and Mr. and Mrs. O for September could not be substantiated.

The producers said that they were unaware of the regulations regarding filing of claims, and when the Ministry's auditor of the processor's books was asked for information in July of 1982, he did not say that there was a time limit in which to make claims. With regard to late payments, the producers maintained that it was only tolerated because it was believed that the processor had no money to pay. The producers also said that the Ministry returned to the processor an envelope containing the plant records. They were unable to understand why these records could not be used to ascertain the amount of milk shipped to the processor.

My Office's investigation included interviews with the complainants; Mr. J.C. McMurchy, Mr. D. Alles, Vice-Chairman, Milk Commission of Ontario; Mr. S. J. Beckley, Administrator, Fund for Milk and Cream Producers. Also, the following were interviewed by telephone: Mr. Richard Bird, Area Field Supervisor, Dairy Inspection Branch; Mr. Al Whitehead, Auditor, Dairy Inspection Branch and Mr. G, owner, the processing facility. In addition, the Ministry's files on the processor were reviewed.

My Office's investigation revealed the following information. The processor was established in 1979 by Mr. G and Ms. H. Their objective was to establish a conveniently situated processing facility that would attract supplies of goats' milk from producers in the Denfield area. Mr. G and Ms. H also owned a farm which produced goats' milk.

To the producers of goats' milk in the area, the establishment of the processor in their midst was a welcome development and they tried to give the processor whatever support they could. However, the enterprise appears to have been a marginal operation and never succeeded in moving on to a very sound financial footing.

Because of financial difficulties, the processor sometimes made late payments to producers such as Mr. and Mrs. J. They objected to these late payments, but were unable to force the processor to pay on time. Towards the end of July, 1982, Mrs. J became very concerned about the processor's ability to continue its operation. She began to ship less milk to the processor. Mrs. J knew that Mr. A. Whitehead, Auditor, Dairy Inspection Branch, had carried out an audit of the processor a few weeks earlier and she tried to contact him. She found out from Mr. Whitehead in late July, 1982, that she could make a claim on the Fund, and the name and address of the Fund's administrator. Mrs. J also contacted Mr. R. Bird, Area Field Supervisor, Dairy Inspection Branch, about her problem in getting payment from the processor. However, from her discussions with Mr. Whitehead and Mr. Bird, she had the impression that a claim on the Fund would result in a suspension of the processor's licence and, therefore, decided not to contact at that time Mr. S. Beckley, the Administrator.

On the morning of September 9, 1982, another producer tried to deliver milk to the processor but found no one there and also discovered that the barn had been emptied of animals. This information was relayed to Mrs. J by Ms. N. Convinced that a licence suspension no longer mattered to the processor, Mrs. J wrote to Mr. Beckley on September 13, claiming assistance from the Fund for June, July and August, 1982. Mr. and Mrs. O claimed on October 1, 1981 for July, August and September, 1982; Mr. P claimed on October 25, 1982 for June, July, August and September, 1982; Ms. N claimed on October 28, 1982 for July, August and September, 1982.

The Milk Commission of Ontario began its investigation of the processor after Mr. and Mrs. Js' claim. The Dairy Inspection Branch was

requested to carry out an audit on the processor. On September 17, 1982, Mr. Whitehead arrived at the processor to carry out the audit. The owner, Mr. G, was uncooperative and Mr. Whitehead was unable to carry out the audit. The Dairy Inspection Branch then called a hearing for October 4, 1982, but Mr. G did not appear at the hearing. He was given until October 22, 1982 to present his books and records to the Ministry of Agriculture and Food local office. Mr. G appealed this decision to the Farm Products Appeal Tribunal which scheduled a hearing for October 26, 1982. The Tribunal decided that Mr. G should present the processor's books and records to the local office of the Ministry of Agriculture and Food on or before December 1, 1982. The Milk Commission discovered on November 2, 1982 that Mr. G had declared bankruptcy on his farm on October 4, 1982. On November 8, 1982, Mr. McMurchy informed the Minister of Agriculture and Food of the status of the claims arising from the processor's collapse, and on November 30, 1982, the Chairman brought the Minister up-to-date on the claims. Mr. G delivered a number of the processor's records to the local office on December 1, 1982. At the end of January, 1983, the auditors of the Dairy Inspection Branch reported that a completely reliable audit was not possible. It was noted by the Chairman of the Commission, in his memorandum dated May 24, 1984 to our Office, that there were no plant processing records presented, there were no records of sales presented, there were no records of milk received at the processor from the producers whose milk was picked up by Mr. G's truck, and there were no weigh scales at the processor.

In a memorandum dated February 1, 1983, the Vice-Chairman of the Commission, Mr. D. Alles, informed Mr. A. Cooper, the Executive Director, Marketing that "the main problem in this case is, however, our inability to obtain adequate records on the company from Mr. G who was the principal of the processor."

However, the Commission did have in its possession copies of the pages from the book in which Mr. G recorded the number of cans of milk received and the processor's invoices showing the amount of milk received each month from each producer.

In his letter of May 27, 1983 to the producers, three reasons were given by the Administrator of the Fund for disallowing the claims:

1. all the claims had been filed too late;

2. there was an arrangement between Mr. G and both the Js and Mr. P whereby the processor was given additional time in which to pay the producer;

3. payment should not be made for September to Ms. N and Mr. and Mrs. O because of lack of evidence.

These three reasons are discussed below:

Late Filing

Section 7(3) of Regulation 391 states:

> An application in Form 1 shall be made not later than the 30th day next following the date on which
>
> (a) the payment in respect of which the application is made became due; or
>
> (b) the whole or any part of the dealer's assets has been placed in the hands of a trustee for distribution under the Bankruptcy Act (Canada) or the Bulk Sales Act.

However, section 13 of Regulation 391 provides the Board with discretionary power in regard to the observance of subsection 7(3). Section 13 states:

> The Board having regard to the circumstances of a case, may make payment from the Fund where a claim for payment is made in substantial conformity with subsection 7(3).

Thus, non-compliance with subsection 7(3) should not lead to automatic disqualification of the claim.

According to the producers, the claims were filed late because they were unaware of the provisions of Regulation 391 and did not even know the Fund existed. When Mrs. J tried to get information from Mr. Whitehead and Mr. Bird of the Diary Inspection Branch, neither one warned her of the 30-day time limit. Our investigator contacted Mr. Bird and Mr. Whitehead. Mr. Bird was not aware of the 30-day time limit. Also, Mr. Whitehead gave no indication that he was aware of this provision in the Regulation (391).

The evidence would indicate that the producers were not even aware of the Fund's existence, let alone the detailed requirements for making claims under Regulation 391. It was not until one year after this affair, on July 18, 1983, that the Dairy Inspection Branch sent out copies of Regulation 391 to producers of milk and cream in Ontario. Given these circumstances, the Board in my view is being unreasonable in not exercising its discretion under section 13 to approve late applications.

2) The "Arrangement"

Section 12(1)(d) of Regulation 391 states:

> The Board may refuse to make payment in respect of a claim,
>
> d) where a producer has made an arrangement with the dealer whereby the time on which payment becomes due is extended.

The Commission's interpretation of this clause is as stated in its letter of May 24, 1984 to my Office: "Clause (d) of subsection 12(1) deals specifically with claims where the action of the claimant appears to circumvent, or attempts to circumvent, payment provisions."

With respect to Mr. and Mrs. J's claim, they maintain that the late payments came about because the processor had no money to pay. Neither Mr. and Mrs. J nor the processor wanted the late payment. Mr. and Mrs. J needed the money and tried to get the processor to pay, but without success. Thus, on the available evidence, it does not seem reasonable to suggest that it was the action of the claimants that led to the late payment or that there was an attempt by the claimants to circumvent payment provisions.

In Mr. P's case, he denies that there was an arrangement, because the processor was not late in paying him prior to the summer of 1982.

3) Lack of Evidence

The Commission said that due to a lack of adequate records, the claims could not be substantiated. However, the Commission does have in its possession copies of the relevant pages from the processor's book in which was recorded the quantity of milk received at the plant.

The dates of some of the entries in the book are not in sequence, showing that the entries were made retroactively. Therefore, it is possible that some deliveries were received but not recorded. This means that the book record may be incomplete. However, the amounts recorded would correspond at least to a minimum if not to the total amounts received. The Fund cannot reasonably object to paying the minimum on the grounds that it should be paying out more. The processor's invoices, showing the amount of milk received each month from each producer, corroborate the entries in the book. Accordingly, I was of the view that it seemed to be unreasonable to penalize the producers if the processor was allowed to operate without proper records, because it appeared to me that it was the responsibility of the Milk Commission and not the responsibility of the producers to ensure that the processor maintained proper records.

The processor used cans of milk as a unit of measurement. Through audits carried out in previous years by the Dairy Inspection Branch, the Milk Commission knew that the processor did not have weigh scales. Nevertheless, the Commission renewed the processor's licence on June 25, 1982 for another year. If the processor's measurement system was not acceptable, it appeared to me that it was the responsibility of the Commission to take the necessary action to have it changed. It seemed unreasonable to penalize the producers because the Commission did not compel the processor to use weigh scales.

Since it appeared to me that there were sufficient grounds to make a recommendation that would adversely affect the Ministry, a letter dated June 14, 1985, setting out the results of my investigation and my possible conclusions and recommendation was sent to Mr. J.C. McMurchy. My tentative conclusions and recommendation were as follows:

> The decision by the Fund to reject the claims is unreasonable because:
>
> 1. It is incompatible with the reason for the Fund's existence.
>
> 2. The Fund is unreasonably stringent in disallowing the claims on the ground that they contravene subsection 7(3) of Regulation 391, made pursuant to the Farm Products Payments Act. Section 13 of the Regulation (391) gives the Board discretionary power in order that minor technical irregularities in making claims would not lead to their disqualification.
>
> 3. In disallowing some claims because of subsection 12(d) of the Regulation, the Fund is unreasonably interpreting delayed payments to some producers as being an "arrangement" to circumvent payment provisions.
>
> 4. The records in the Fund's possession are adequate for determining the amounts that should be paid on each claim.
>
> Possible Recommendation
>
> The Fund should pay a 60-day period on each claim, for milk delivered to the processor under section 14 of Regulation 391.

After telephone calls to the Commission and a letter dated October 29, 1985 requesting a response to my letter of June 14, I received a letter dated December 2, 1985 from Mr. R.E. Duckworth, Executive Director, Marketing Division, Ministry of Agriculture and Food. Mr. Duckworth raised the following points:

1) The Provincial Auditor indicated that the decision of the Milk Commission not to pay the claims was the only decision that could be made in the circumstances.

2) The Milk Commission did not have any legal authority to ensure that the processor maintained proper records.

3) Monies in the Fund are contributed by the milk producers and processors in the province and the Milk Commission only acts as a trustee in administering the Funds. To allow claims which are not verifiable would not assist the objective of maintaining the integrity of the milk marketing industry.

4) The producers' claims cannot be considered timely.

5) It is a well known fact that any producers who did not agree and who complained to the processor about late payments did not remain shippers for very long.

6) Records that were not supplied include the following: bank statements or cancelled cheques, bookkeeping records, disbursement records, reconciliation statements, check book stubs, petty cash ledgers, record of milk intake, plant products records, plant sales records, and inventory records.

I have carefully considered Mr. Duckworth's submissions and my comments on the aforementioned points are as follows (in the same order):

1) The auditor is concerned with adherence to the regulations. My Office's investigation focused on the fairness and the reasonableness of the Fund's decision. Thus, while the auditor's views in this matter are noteworthy, I am concerned with the equity of the situation.

2) My position is that if anyone had the responsibility for ensuring that the processor maintained proper records it was the Milk Commission and certainly not the producers. The Dairy Inspection Branch had carried out audits on the processor but nothing was done about the processor's inadequate record keeping. For this reason, the producers should not be penalized.

3) The producers do not contribute to the Fund. The money in the Fund is a producers' pool of money from which claims can be made even though it is contributed solely by processors. As discussed later, the claims related to the processor are verifiable.

4) Before their problems with the processor, the claimants were not aware of the Fund's existence, nor was the 30-day time limit for filing claims raised in their discussions with Ministry officials. The Commission circulated copies of Regulation 391 to milk and cream producers of Ontario one year after these claims. I am of the view that it is unreasonable for the Commission in these circumstances to hold the claimants strictly to the time limits for filing claims, especially when the Commission has the discretion to accept late claims.

5) The Ministry's statement confirms my interpretation that the late payments were imposed on unwilling producers by the processor, i.e., there was no "arrangement" to circumvent payment provisions.

6) The Fund does have a record of the milk intake. None of the other records is needed to verify the amount of milk shipped by the producers.

To sum up, the claimants had all delivered milk to the processor and were not paid for it. The objective of the Fund is to deal with such situations. The Milk Commission knew from its audits on the processor that the processor's record-keeping needed to be improved. The Commission could have taken steps to ensure that the processor improved its record-keeping, and could have circulated copies of Regulation 391 to all producers of milk and cream at an earlier date.

The evidence shows that the complainants did not know of the Fund and did not know how to make claims. Section 13 of Regulation 391 grants the Commission some discretion in handling late claims which I feel should have been exercised in the circumstances of these claims. It is also my opinion that the late payments were unilaterally imposed by the processor and were not the result of an arrangement made by the producers to circumvent payment provisions.

I have therefore concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry's decision not to pay the producers' claims was unreasonable. In view of my conclusion, it is my recommendation, pursuant to section 22(3)(g), that the Milk Commission of Ontario pay the first 60-day period on each of the claims arising from the financial collapse of the processor.

My final conclusions and recommendation were reported to the Minister on February 26, 1987 and, pursuant to the discretion given to me under section 22(4) and (5) of the Ombudsman Act, I referred the matter to the Premier on October 24, 1986. The complainants were also advised of the results of my investigatiion at that time and the file was closed.

DETAILED SUMMARY NO. 2

Mrs. L first brought her complaint concerning the Office of the Public Trustee and its handling of the estate of her late ex-husband, Mr. L, to the attention of my Office by a letter which we received on February 10, 1983. In accordance with section 19(1) of the Ombudsman Act, by letter dated March 16, 1983 we notified the Public Trustee, Mr. A.J. McComiskey, of our intention to investigate Mrs. L's complaint, and invited him to provide a statement of his view of the complaint. Mr. McComiskey responded to that request by letter dated March 28, 1983.

On May 25, 1983, Mrs. L's file was assigned to a former member of my staff for investigation. My investigator met with Mr. McComiskey on June 29, 1983, at which time he answered her questions by reference to his office's file on Mr. L's estate. He declined, however, to permit her to review the file on her own.

After I spoke with Mr. McComiskey and with Mr. S. Sokol, a lawyer with the Public Trustee's office, a partial distribution of Mr. L's estate was made to Mrs. L on April 3, 1984. A further partial distribution was made on May 2, 1984 and on June 11, 1984, after all other creditors had been paid in full, as Mrs. L had agreed, the balance of the estate was paid to her. By letter dated March 19, 1985, Mrs. L advised that she wished us to continue to investigate her concerns.

Because the Public Trustee was denying my staff full access to his files, Mrs. L's case was held in abeyance. Then, in the summer of 1985, an agreement was reached between my Office and the Office of the Public Trustee whereby my staff would be permitted direct access to his files, including that of Mr. L. On October 15, 1985, Mrs. L's file was assigned to another member of my investigative staff for further review. She met with Mr. McComiskey on November 1, 1985, when she was allowed to examine Mr. L's file.

My investigator has discussed his office's handling of Mr. L's estate with Mr. McComiskey and has interviewed the complainant, Mrs. L. The relevant legislation, namely, the Crown Administration of Estates Act, R.S.O. 1980, c. 105, the Income Tax Act, R.S.C. 1970, c. I-5, as amended, and the Public Trustee Act, R.S.O. 1980, c. 422 have been reviewed. The Bank of Canada Review for 1980 to 1984 and Law of Trusts in Canada, by D.W.M. Waters, have also been consulted.

After reviewing the information gathered during our investigation, and acting in accordance with section 19(3) of the Ombudsman Act, by letter dated March 24, 1986, I advised Mr. McComiskey that I was considering the following conclusions and recommendations, and invited him at that time to make representations thereon.

POSSIBLE CONCLUSIONS:

1. That the Public Trustee delayed unreasonably in distributing the estate of Mr. L. [Reference: Ombudsman Act, s.22(1)(b)]

2. That the Public Trustee unreasonably failed to provide Mrs. L with an explanation of the legal fees deducted from the funds distributed to her. [Reference: Ombudsman Act, s.22(1)(b)]

3. That the Public Trustee unreasonably failed to respond to correspondence from Mrs. L's solicitors. [Reference: Ombudsman Act, s.22(1)(b)]

POSSIBLE RECOMMENDATIONS:

1. That the Public Trustee reimburse Mrs. L for interest lost by her during periods of unreasonable delay by his office. [Reference: Ombudsman Act, s.22(3)(g)]

2. That in future the Public Trustee explain his authority and reasons to those from whom he deducts legal fees. [Reference: Ombudsman Act, s.22(3)(b)]

3. That in future the Public Trustee make every reasonable effort to acknowledge correspondence from parties interested in estates he is administering. [Reference: Ombudsman Act, s.22(3)(b)]

These possible conclusions and recommendations were based on the following information.

Mrs. L is the ex-wife of Mr. L, who died on November 15, 1979. As Mr. L had no known next of kin living in Ontario, the Public Trustee obtained letters of administration of his estate pursuant to section 2 of the Crown Administration of Estates Act, which reads in part as follows:

> Where a person dies in Ontario intestate without leaving any known next of kin living in Ontario ... the Public Trustee may apply for letters of administration ... of the estate of such person and a competent court upon the application may grant administration to the Public Trustee for the use and benefit of Her Majesty or of such persons as ultimately appear to be entitled thereto.

As Mrs. L was owed maintenance arrears of some $24,100 by the estate, her lawyer filed a claim with the Public Trustee's office.

Our review of the Public Trustee's file suggested, as Mrs. L has contended, that he delayed unduly in distributing Mr. L's estate, and that periods of avoidable delay on his office's part can be identified. It has been the Public Trustee's position, as stated in his letter to my Office of March 28, 1983, that distribution could not occur until his

office received an income tax clearance certificate, ensuring its non-liability for taxes owed by the estate. This statement was, of course, made before the estate was distributed, which occurred while our investigation was ongoing.

The Public Trustee's file indicates that on April 22, 1981, the Estates Officer who handled Mr. L's file, R. Madden, requested an income tax clearance from the Director of Taxation, Revenue Canada (Thunder Bay). This application was made pursuant to subsection 159(2) of the Income Tax Act which required that "every assignee, liquidator, administrator, executor and other like person, other than a trustee in bankruptcy, before distributing any property under his control, shall obtain a certificate from the Minister certifying that taxes, interest or penalties that have been assessed under this Act and are chargeable against or payable out of the property have been paid or that security for the payment thereof has, in accordance with subsection 220(4) been accepted by the Minister." Subsection (3) provided that "distribution of property without a certificate required by subsection (2) renders the person required to obtain the certificate personally liable for the unpaid taxes, interest and penalties."

On August 13, 1981, the Taxroll Section, Revenue Canada (Thunder Bay) wrote to request that the Public Trustee's office submit a 1979 tax return and pay outstanding 1978 taxes on behalf of Mr. L.

On September 29, 1981, Mr. Madden wrote to the solicitors for Mr. L's parents to request a list of Mr. L's household goods, the name and address of Mr. L's former employer and a list of Mr. L's creditors. On the same date, Mr. Madden asked J. Hayter, Income Tax Section, Public Trustee's office, to apply for an income tax clearance certificate. By letters dated January 28 and February 11, 1982, the information Mr. Madden requested from the solicitors was submitted.

By letter dated June 1, 1982, Mr. Hayter requested a T-4 slip and information respecting death benefits from Mr. L's former employer. Mr. Hayter submitted income tax returns for Mr. L for 1979, 1980 and 1981 on September 22, 1982.

On August 8, 1983, the Field Audit section, Revenue Canada (Toronto) requested submission of the following before a clearance certificate would be issued: 1) a copy of the will, date of death, social insurance number; 2) a statement of assets; 3) in the case of intestacy, a list of beneficiaries and the proposed distribution of the estate; and 4) the date of the final Notice of Assessment. Mr. W. Morrison, a solicitor with the Public Trustee's Office wrote to Revenue Canada on October 11, 1983 to advise of an existing agreement between Revenue Canada and the Public Trustee whereby the latter could obtain a clearance certificate without submission of the usual documentation required of administrators. On November 11, 1983, an interim (TX21-A) income tax clearance certificate was issued by Revenue Canada. Mr. McComiskey has advised my investigator that this interim certificate was sufficient

basis upon which to distribute the estate. However, as mentioned above, the final distribution of the estate was not made until seven months later, on June 11, 1984.

Accordingly, it appeared to me that there were three periods of unreasonable delay between the time the Public Trustee's office assumed control of the estate and its distribution.

First, Revenue Canada's initial demand for a 1979 tax return and $807.56 in outstanding 1978 taxes was made on August 13, 1981. It seems to me that the latter amount could have been paid when requested and that efforts should have been made as soon as possible to obtain the information needed to submit the requested return.

In September of 1981, Mr. Madden of the Public Trustee's office took the necessary action by requesting information regarding Mr. L's goods, creditors and former employer. Such information was received by that office by February of 1982. However, no request was made of Mr. L's former employer for a T-4 slip until June of 1982. Tax returns for the year 1979 were eventually submitted on Mr. L's behalf in September of 1982, thirteen months after the initial payment.

Secondly, in August of 1983, Revenue Canada requested certain information which Mr. McComiskey advised his office is not generally required to submit. However, it would appear that much of the information requested was already on Mr. L's file. Therefore, the delay between August and October of 1983, when the Public Trustee's staff contested Revenue Canada's entitlement to the information it had requested, appears to have been unnecessary.

Finally, Mr. McComiskey has advised my investigator that the interim income tax clearance certificate received by his office in November of 1983 was sufficient basis for a distribution of the estate. He has offered us no explanation, however, for the five-month delay between receipt of the interim certificate and the first partial distribution of the estate.

In summary, I identified the following periods of undue delay by the Public Trustee's office: August 1981 to September 1982; August 1983 to October 1983; and November 1983 to June 1984.

Subsection 5(2) of R.R.O. 1980, Regulation 887 made under the Public Trustee Act provides for the payment of interest on money of Crown estates held by the Public Trustee at a rate of 3% per annum, compounded half-yearly. Where there is a delay in the distribution of an estate which might have been avoided by the Public Trustee, it would appear appropriate for his office to compensate Mrs. L for the loss of interest her funds might have earned had they been available and invested elsewhere.

Based on figures provided by the Bank of Canada Review, I determined the following loss to have been sustained on a round sum of

$20,000, ignoring the compounding factor and using for comparison the simple average of the rates of interest paid on chartered banks' non-chequing savings deposits for the relevant months.

Period of Delay (inclusive)	Simple Average Chartered Bank Deposit Interest Rate	Public Trustee Rate	Loss on $20,000
Aug. 1981 - Sept. 1982	13.86%	3 %	$2,772 - $699 = $2,073
Aug. 1983 - Sept. 1983	0.01125%	0.005%	$ 225 - $100 = 125
Nov. 1983 - June 1984	0.0479%	0.02%	$ 958 - $400 = 558
			$2,756

Mrs. L has raised two further issues. First, after the distribution of Mr. L's estate, she questioned the deduction by the Public Trustee's office of $300 for legal fees from the balance she received. Secondly, she contended that the Public Trustee's failure to respond to her solicitor's letters of September 17, October 27 and November 16, 1982 was unreasonable. In his letter of March 28, 1983, Mr. McComiskey informed us that Mr. Morrison, the solicitor with his staff who was handling Mr. L's file, had advised Mrs. L's lawyer in July of 1982 that the administration of the estate was completed pending receipt of tax clearance. Mr. McComiskey said that since there was nothing further to add to their telephone conversations, Mr. Morrison did not reply to the solicitor's further letters. In my letter to Mr. McComiskey of March 24, 1986, I made the following comments respecting these two issues.

It appears from the Public Trustee's file that his office deducted $300 for the work of his legal staff in settling outstanding claims against Mr. L's estate from the balance to be distributed to Mrs. L. The deduction of legal fees from estates administered by the Public Trustee is authorized by section 8 of the Public Trustee Act. However, I said that in my opinion, the Public Trustee acted unreasonably in failing to provide Mrs. L with an explanation of his authority and reasons for deducting these fees. The duty of a trustee to account for his handling of estates is well established at common law.

Finally, since Mrs. L resides in British Columbia and since a considerable amount of money was involved from her point of view, it appeared to me to have been inappropriate and discourteous of the Public Trustee's staff to have failed to acknowledge correspondence received from Mrs. L's solicitor.

In response to my request in my letter of March 24, 1986 for representations, Mr. McComiskey wrote to me on April 7, 1986.

With respect to the delay issue, Mr. McComiskey indicated that receipt of a TX21-A income tax clearance certificate does not entitle an

administrator to distribute an estate; rather, a final clearance (TX21) is required. According to Mr. McComiskey, Mrs. L's claim had not been substantiated when the TX21-A clearance was received in November of 1983. To avoid costly court proceedings, an arrangement was made whereby Mrs. L would be paid the remainder of the estate after all other claims were paid in full. In commenting on the second period of delay I had identified as unreasonable, it was the Public Trustee's position that Revenue Canada's request for further information about the estate was a standard form letter and that Mr. Sokol, the solicitor who then had carriage of Mr. L's file, responded to it by telephone.

Mr. McComiskey also commented that if Mrs. L was dissatisfied with the Public Trustee's administration, she might, as a creditor of the estate, have applied for a court order removing the Public Trustee as administrator and appointing someone else in his stead. Mr. McComiskey pointed out that Mrs. L also had the right to require the Public Trustee to pass his accounts before the Surrogate Court, by the procedure outlined in section 74(3) of the Surrogate Courts Act, R.S.O. 1980, c. 491. The relevant provisions of that statute are as follows:

> 74(3) The judge, on passing the accounts of an executor, administrator or such a trustee, has jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and the administration and disbursement thereof in as full and ample a manner as may be done in the Master's office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting, subject to appeal.
>
> (4) The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund, and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as he considers proper and just to the estate or trust fund, but any order made under this subsection is subject to appeal.
>
> 75(1) An executor or an administrator shall not be required by any court to render an account of the property of the deceased, otherwise than by an inventory thereof, unless at the instance or on behalf of some person interested in such property or of a creditor of the deceased, nor is an executor or administrator otherwise compellable to account before any judge.

(2) This section applies notwithstanding any provision to the contrary of any bond or security heretofore given by the executor or administrator.

Mr. McComiskey added that, in his opinion, the availability of the above remedy deprives the Ombudsman of jurisdiction to consider Mrs. L's case.

On the second issue, the failure to explain his legal fees, the Public Trustee responded that the amount of legal costs in this case was almost minimal, and that if Mrs. L had any objection to the amount of legal costs, she could have requested that the bill be taxed. Mr. McComiskey did not offer any further comments on the third issue, the failure by his office to respond to correspondence from Mrs. L's solicitor.

In considering the arguments raised by Mr. McComiskey, the initial matter with which I have had to deal is the jurisdictional challenge, for if, as Mr. McComiskey suggests, I lack jurisdiction to consider Mrs. L's complaint, all my other findings would become moot.

First, it does seem clear from the provisions of the Surrogate Courts Act cited above that, as a creditor of the estate, Mrs. L would have had the right to require the Public Trustee to pass his accounts, and that this right continues to remain open to her, as the legislation does not contain any time limit on its exercise.

Secondly, section 15(4)(a) of the Ombudsman Act prevents me from investigating "any decision, recommendation, act or omission, (a) in respect of which there is, under any Act, a right of appeal or objection, or a right to apply for a hearing or review, on the merits of the case to any court, or to any tribunal constituted by or under any Act, until that right of appeal or objection or application has been exercised in the particular case, or until after any time for the exercise of that right has expired." It appears to be Mr. McComiskey's position that Mrs. L's complaint is covered by this section.

In his letter to my Office of April 7, 1986, Mr. McComiskey mentioned that on June 5, 1984 Mrs. L signed a release indicating that she did "remise, release and forever discharge the estate of [Mr. L] and the Public Trustee of and from all manner of actions, suits, debts, duties, accounts, bonds, covenants, contracts, demands and claims for debts and costs whatsoever which against the said estate she ever had, has or shall or may have." Since the Public Trustee evidently intends to treat this release as efficacious, and since its wording would appear to cover a passing of accounts by Surrogate Court, I would suggest that the Public Trustee is now estopped from claiming that the Surrogate Court remedy remains open to Mrs. L. I note that, on its face, the release does not appear to preclude my jurisdiction, as it refers to such matters as suits, debts and claims, not to complaints and recommendations, and would in any case only bind the parties to the release, not the Ombudsman.

Dealing, then, with Mr. McComiskey's arguments as to the merits of this complaint, I do not find his explanation for his delay in distributing Mr. L's estate persuasive.

I am aware that administrators require an income tax clearance from Revenue Canada Taxation before proceeding to distribute an estate, and that failure to obtain such a clearance would render an administrator personally liable for payment of any taxes owed by the estate. This requirement is specified by section 159(2) of the Income Tax Act, to which I have referred above. In addition, Revenue Canada's Interpretation Bulletin IT-282R deals with clearance certificates respecting estate or trust distributions. That bulletin provides, in part, as follows:

> Depending on the circumstances, one of the following three forms of clearance certificates is issued by the Department:
>
> (a) Form TX21-A for years prior to death and for the period ending with the date of death;
>
> (b) Form TX21-B for partial distributions of property;
>
> (c) Form TX21 (issued only once) for final distribution of all the property.
>
> Forms TX21-A and TX21-B need not be obtained prior to obtaining Form TX21.

My staff has spoken with an estates trust officer with a trust company on this subject. We have been advised that, in the normal course, an estate administrator files a T-1 income tax return for the year of death, then requests a TX21-A certificate, which would provide a clearance respecting the deceased's liability for taxes for all prior years up to and including the year of death. Normally, a major distribution of the estate would be made by the trust company after it receives the TX21-A clearance, as the company would then be in a position to estimate its fee and any outstanding taxes to be paid.

Although I appreciate that the nature of estates handled by the trust company would differ somewhat from those in the hands of the Public Trustee, this information is consistent with Mr. McComiskey's statement to my investigator that a distribution could be made after the TX21-A clearance certificate was received. In addition, a distribution of Mr. L's estate was made prior to receipt of the final income tax clearance certificate, which was dated June 28, 1985.

With respect to the letter received from Revenue Canada in August 1983, I have never questioned that it was a standard form request for information. However, if as Mr. McComiskey suggests it could have been and was responded to by a simple telephone call, then I am puzzled by the two-month period between August and October 1983 in which no action seems to have been taken on this file.

Mr. McComiskey has suggested that part of this delay in distributing Mr. L's estate was due to the fact that when the TX21-A clearance was received in November of 1983, Mrs. L's claim had not as yet been substantiated. My investigator's review of the Public Trustee's file confirms that, by letter dated November 2, 1983, Mr. L's family did dispute Mrs. L's claim. However, we have not found any evidence that the Public Trustee's office advised Mrs. L of these difficulties, other than to request in October of 1983 an up-to-date affidavit respecting the maintenance arrears owed to Mrs. L. The Public Trustee's office did not, to my knowledge, ever inform Mrs. L that the status of her claim was in dispute.

In his April 7, 1986 letter, Mr. McComiskey said that "rather than get involved in a lot of expensive court proceedings, an arrangement was worked out under which [Mrs. L] would be paid the entire estate up to the total of her claim after the other claimants had received payment of their claims as substantiated." I should note that this arrangement was only made after I spoke with Mr. McComiskey in April of 1984, at which point Mrs. L was in such dire need of funds that she was willing to forego her full claim and was prepared to agree to the payment of other creditors in full.

I also wish to comment on Mr. McComiskey's suggestion that, if Mrs. L was dissatisfied with the Public Trustee's handling of the estate, she herself might have applied for letters of administration. I find such a suggestion appalling. As Mr. McComiskey surely must have been aware, Mrs. L was on welfare at the time, and was living in British Columbia. As such, it could hardly have been practicable for her to act as administrator. It seems to me that Mr. L's is a case to which section 2 of the Crown Administration of Estates Act is expressly directed, as it enables the Public Trustee to apply for letters of administration when a person dies intestate in Ontario without leaving any known next-of-kin in the province.

In view of my finding that the Public Trustee unreasonably omitted to take timely action in distributing Mr. L's estate, I am prepared to suggest a sum as appropriate compensation for Mrs. L. In my letter to Mr. McComiskey of March 24, 1986, I had suggested a figure of $2,756, calculated as shown above. However, in reviewing the facts of this case, it appears to me that the period from August 1981 to September 1982 cannot entirely be attributed to unreasonable delay on the Public Trustee's part. Therefore, I believe the first period of delay should be reduced by five months, to reflect the fact that between late September of 1981 and February of 1982, the Public Trustee's office was awaiting information from Mr. L's parents' solicitors, a matter beyond its control.

My calculations are as follows, made on the same basis as stated above.

Period of Delay (inclusive)	Simple Average Chartered Bank Deposit Interest Rate	Public Trustee Rate	Loss on $20,000	
Aug. 1981 - Sept. 1981	3.167%	0.005%	$ 633 - $100 =	$ 533
Mar. 1982 - Sept. 1982	7.229%	0.0175%	$1,446 - $350 =	1,096
Aug. 1983 - Sept. 1983	0.01125%	0.005%	$ 225 - $100 =	125
Nov. 1983 - June 1984	0.0479%	0.02%	$ 958 - $400 =	558
				$2,312

Turning, then, to the question of the Public Trustee's legal fees, I wish only to comment that Mr. McComiskey might have misunderstood my concern about this issue. In my letter of March 24, 1986, I advised the Public Trustee that in my opinion he acted unreasonably in failing to explain his authority and reasons for his deduction of legal fees. I did not question the reasonableness of the amount of those fees.

It seems to me that by suggesting that Mrs. L might have had her bill taxed, the Public Trustee has taken an inappropriately adversarial stance. Surely the most practical and least expensive approach would be for him to provide, on a routine basis, an explanation of his authority to deduct legal fees from the estates he handles, rather than requiring interested parties such as Mrs. L to assume the additional expense of a taxation of costs, of seeking an explanation from a solicitor, or of making long distance telephone calls to the Public Trustee.

Finally, I continue to be of the belief that the Public Trustee acted inappropriately in omitting to respond to correspondence from Mrs. L's solicitor, particularly in view of the fact that Mrs. L was living in British Columbia in impoverished circumstances at the time.

In summary, then, the following are my findings in this case.

CONCLUSIONS:

1. That the Public Trustee unreasonably omitted to take timely action in distributing the estate of Mr. L. [Reference: Ombudsman Act, s.22(1)(b)]

2. That the Public Trustee unreasonably omitted to provide Mrs. L with an explanation of the legal fees deducted from the funds distributed to her. [Reference: Ombudsman Act, s.22(1)(b)]

3. That the Public Trustee unreasonably omitted to respond to correspondence from Mrs. L's solicitors. [Reference: Ombudsman Act, s.22(1)(b)]

RECOMMENDATIONS:

1. That the Public Trustee reimburse Mrs. L for interest lost by her during periods of unreasonable delay by his office. [Reference: Ombudsman Act, s.22(3)(g)]

2. That in future the Public Trustee explain his authority and reasons to those from whom he deducts legal fees. [Reference: Ombudsman Act, s.22(3)(b)]

3. That in future the Public Trustee make every reasonable effort to acknowledge correspondence from parties interested in estates he is administering. [Reference: Ombudsman Act, s.22(3)(b)]

My final conclusions and recommendations were reported to the Public Trustee on December 22, 1986; we received his response on February 2, 1987. As it was my opinion that this response failed to adequately address Mrs. L's concerns, by letter dated February 18, 1987 I informed the Premier of my findings in this case.

DETAILED SUMMARY NO. 3

Mrs. M brought her concerns to the attention of my Office by a letter dated October 18, 1984. As a result, in our letter of November 13, 1984, we notified the Public Trustee, Mr. A.J. McComiskey, Q.C., of our intention to investigate the following complaint:

> The Public Trustee's Office took control of Mrs. M's estate and finances in December of 1983. Following her release and the cancellation of her Certificate of Incompetence, the Public Trustee's Office notified her on June 2, 1983 that it no longer had jurisdiction over her estate.
>
> It is Mrs. M's contention that the Public Trustee's priorizing of payments it was to make on her behalf did not reflect her best interests, as it chose to pay her taxes rather than her mortgage. In her opinion, this ineffective priorizing eventually resulted in the loss of her house and property. Furthermore, it is Mrs. M's contention that the Public Trustee's Office unreasonably continued its control over her assets after notifying her of the termination of its jurisdiction and responsibility.

We invited Mr. McComiskey to provide a statement of his view of Mrs. M's complaint; he did so by letter dated November 19, 1984. In that letter, he detailed his reasons for finding Mrs. M to have over-extended her financial resources, with the results that insufficient funds were available to make mortgage payments and that sale of Mrs. M's house by the Public Trustee was recommended by the estates officer handling her funds.

On December 3, 1984, we sent Mrs. M a copy of Mr. McComiskey's letter, and received her comments on his response on December 11, 1984. Mrs. M's file was assigned to Ms. Rosemary Logan of my staff for investigation on December 10, 1984, but this investigation was held in abeyance until August of 1985, when a dispute between my Office and the Public Trustee respecting the latter's refusal to grant my staff direct access to his files was resolved.

During our investigation, our investigator reviewed the Public Trustee's file on Mrs. M. She interviewed Mr. McComiskey, Mr. Brian Ritchie, the estates officer assigned to Mrs. M's case, and Mrs. M. Chathoth, the estates accounting officer responsible for closing out Mrs. M's file. In addition, the Public Trustee Act, R.S.O. 1980, c. 422, the Mental Health Act, R.S.O. 1980, c. 262 and the regulations thereunder have been reviewed. That investigation revealed the following information.

On November 30, 1983, while a patient at a general hospital, Mrs. M was certified incompetent. Pursuant to section 38 of the Mental Health Act, the Public Trustee then became committee of her estate.

At the time of her hospitalization, Mrs. M had been living in a house in Ontario City A. On January 4, 1984, a Survey of Real Estate completed by the Public Trustee's staff showed a valuation for cash sale of this house of $40,000. The property was subject to a mortgage of some $32,000, but the monthly payments on that mortgage were not made after the Public Trustee's assumption of control over Mrs. M's finances. Our information is that this decision was based on Mrs. M's difficult financial circumstances. The Public Trustee's file indicates that her monthly income was $954.84 and that her monthly expenses were $1,124.26.

The Public Trustee's office was advised by letter dated January 9, 1984, Mrs. M's attending physician at a general hospital, that she planned for Mrs. M to be transferred to a psychiatric hospital, and that it was "difficult to determine whether Mrs. M will ever return to independent living".

On February 10, 1984, the solicitor for Mrs. M's mortgagees wrote to Brian Ritchie. The solicitor advised that the mortgagees wished to inspect Mrs. M's property to determine its value. Normally, such an inspection is preliminary to a sale of property by mortgagees.

Before replying to the solicitor, Mr. Ritchie prepared an Approval for Sale of Real Estate form on February 13, 1984, indicating therein that Mrs. M's finances were insufficient to meet her obligations and suggesting to Mr. McComiskey that the solicitor for Mrs. M's mortgagees be advised that default in the mortgage was necessary and that the house would be sold to retire the outstanding debt. Mr. McComiskey signified his approval of Mr. Ritchie's suggestion on February 13, 1984.

Mr. Ritchie has advised my investigator that sale of a property by the Public Trustee would not be contemplated unless his office is advised that the patient will not be able to return to independent living or if a foreclosure is pending. It appeared here that both of these conditions were met.

Mr. Ritchie also informed my investigator that upon receiving correspondence from Mrs. M's mortgagees' lawyer suggesting that a sale was planned, it was his opinion that it would be preferable for the Public Trustee's office to sell the house instead. In the case of foreclosure, any surplus realized above the mortgage debt could be kept by the mortgagees; this would not occur if the Public Trustee's office completed the sale.

Eventually, on March 5, 1984, Mr. Ritchie replied to the solicitor, denying his request for a valuation of the property, on the basis that Mrs. M's financial situation prohibited the $40 per hour cost of having one of the Public Trustee's outside investigators go through the property with the mortgagees. It appears to me that this refusal was prejudicial to Mrs. M's best interests, as an appraisal would be a means to ensure that, had it been necessary for the mortgagees to sell the property, they would obtain fair market value.

After this correspondence and despite Mr. McComiskey's approval of the sale, in February of 1984, as the proper course of action in Mrs. M's case, no action was taken by his Office to carry out the sale of her house.

On May 2, 1984 a Notice of Cancellation of Certificate of Incompetence was issued respecting Mrs. M, ending the Public Trustee's committeeship, as is specified in section 42 of the Mental Health Act.

At that time, Mrs. M's file was transferred to the Public Trustee's accounting department for preparation of final accounts and notification of all relevant parties, such as creditors and pension authorities, that his Office no longer controlled Mrs. M's finances. Public Trustee compensation was then also calculated.

Since the Public Trustee had concluded that the patient's financial circumstances were such as to justify default in her mortgage, and since section 55 of the Mental Health Act gives him discretion to forego compensation in cases of poverty or hardship, it appears that it would have been appropriate for him to forego his Public Trustee compensation of $750, thereby avoiding a debit balance of $522.91 in Mrs. M's account.

On May 7, 1984, the solicitor for Mrs. M's mortgagees wrote to Mrs. M's daughter to advise that the mortgage on the house had not been paid since January 1, 1984 and to ask that the arrears be paid. On May 29, 1984, the solicitor issued a Notice of Sale Under Mortgage on behalf of Mrs. M's mortgagees. The amount due under the mortgage (including interest and costs) was $33,868.42.

A copy of a letter dated July 10, 1984, in which the solicitor asked that Mrs. M contact him if she was able to put the mortgage in good standing or pay it out was sent to the Public Trustee's Office. The expiry date for the taking back of the house by the mortgagees was July 13, 1984.

On August 1, 1984, the Public Trustee's Office closed Mrs. M's file and sent her assets to her by registered mail. Mrs. M received these assets on August 16, 1984. Prior to this date, the fact that her funds were held by the Public Trustee prevented her from responding to her mortgagees' request that she pay the arrears owed.

The closing date for the mortgagees' sale of the property to a third party was August 24, 1984. The Agreement of Purchase and Sale and Amended Statement of Adjustments show a purchase price of $33,226.38, including the purchaser's portion of 1984 taxes. The mortgagees obtained a judgment against Mrs. M on October 22, 1984 in County Court for possession of the land and for the sums of $31,090.42 for debt, $3,853.98 for interest to date and $157.00 for fixed costs. The judgment was to bear interest at 13% per annum.

On May 9, 1985, the solicitor for Mrs. M's mortgagees wrote to Mrs. M's daughter to advise that the net amount applicable to the mortgage after exercise of the power of sale was $29,694.54. An enclosed statement of

account indicated that Mrs. M owed a deficiency of $5,406.86, plus interest to May 22, 1985 (at a rate of 13% for seven months) totalling $410.02. Mrs. M has not yet paid this sum.

It appeared that the Public Trustee's Office may have delayed unreasonably in commencing sale of Mrs. M's house, given correspondence received from her mortgagees which indicated that a sale on their part was imminent. Had he begun sale proceedings, the Public Trustee might have used his authority under section 50(c) of the Mental Health Act to carry out and complete the transaction, notwithstanding that his committeeship had been terminated.

It may be that Mrs. M suffered a loss by the sale of her house by the mortgagees at a price lower than could have been obtained by the Public Trustee, or that a more expeditious sale would have reduced the sum of interest on the mortgage debt owed by Mrs. M. A precise calculation of such a possible loss would be difficult to make.

It did, however, seem clear that a sale of the house by the Public Trustee's Office would have made it unnecessary for the mortgagees to obtain a judgment against Mrs. M. It was my tentative opinion, therefore, that the Public Trustee should reimburse Mrs. M for the judgment interest accrued to date. According to our calculations, the amount of interest owed as of April 22, 1986 would be $1,054.34.

Based on the information established by our investigation as set out above, it appeared open to me to make a report supporting Mrs. M's complaint.

Section 19(3) of the Ombudsman Act requires that if at any time during the course of an investigation, it appears to me that there may be sufficient grounds for a report or recommendation that may adversely affect a governmental organization, that organization shall be given an opportunity to make representations respecting the adverse report or recommendation. Accordingly, on April 7, 1986, Mrs. Eleanor Meslin, Acting Ombudsman, wrote to Mr. McComiskey, outlining the results of our investigation to date and my possible conclusions and recommendations. The latter were stated as follows:

Possible Conclusions:

(1) That the Public Trustee unreasonably refused to permit an appraisal of Mrs. M's property, thereby prejudicing her ability to determine whether fair market value had been obtained upon its sale. [Reference: Ombudsman Act, s. 22(1)(b)]

(2) That the Public Trustee was unreasonable to have levied compensation of $750, creating a debit balance in Mrs. M's finances. [Reference: Ombudsman Act, s. 22(1)(b)]

(3) That the Public Trustee was unreasonable to have failed to carry out the sale of Mrs. M's house before relinquishing control of her finances. [Reference: Ombudsman Act, s. 22(1)(b)]

Possible Recommendations:

(1) That in cases where the sale of real property is inevitable, the Public Trustee facilitate the sale by obtaining or allowing mortgagees to obtain appraisals of the property. [Reference: Ombudsman Act, s. 22(3)(d)]

(2) That this is an appropriate case for the foregoing of Public Trustee compensation, as provided for in section 55 of the Mental Health Act, and that Mrs. M should accordingly be reimbursed $750. [Reference: Ombudsman Act, s. 22(3)(g)]

(3) That the Public Trustee compensate Mrs. M for the judgment interest she must pay as a result of her mortgage being in default. [Reference: Ombudsman Act, s. 22(3)(g)]

Mr. McComiskey responded by letter dated April 24, 1986. The following sets out his responses to the above-noted possible conclusions and recommendations, and my comments on his response.

Firstly, respecting the mortgagees' request for an inspection of Mrs. M's property, in order that an appraisal might be made, Mr. McComiskey stated that such an examination would only have benefited the mortgagees, not the mortgagor, Mrs. M. He noted that there was nothing to prevent Mrs. M from obtaining appraisals after the jurisdiction of his office ended and selling the property before the mortgagees took sale proceedings, and that his staff had written to the solicitor for the mortgagees to explain the decision not to permit the requested appraisal.

In my opinion, although Mr. McComiskey has correctly stated that the mortgagees would have benefited from the appraisal they requested, that appraisal might also have assisted Mrs. M. If the mortgagees had proceeded to sell without an appraisal, Mrs. M might have been precluded from disputing the price obtained since the Public Trustee had prevented an appraisal from taking place. That is, it would be difficult in those circumstances to ascertain whether the mortgagees had sold the property for a fair price.

I would also note, respecting Mr. McComiskey's comment that Mrs. M herself might have proceeded to obtain appraisals and sell the house after being declared competent, that in the circumstances such a course of action would not have appeared feasible. Mrs. M's assets were released by the Public Trustee's office on August 1, 1984 and were received by her on August 16, 1984, one week before the closing date of the sale of the property by the mortgagees to a third party. In addition, the time allotted to Mrs. M by her mortgagees for taking back the mortgage expired on July 13, 1984, two days after the Public Trustee's office wrote to Mrs. M to advise that its jurisdiction had ceased.

Secondly, Mr. McComiskey stated that his office had done a great deal of work on Mrs. M's behalf and that there was no reason for not charging compensation. He noted that when accounts were sent to Mrs. M, she had signed a release.

I have not questioned Mr. McComiskey's legal entitlement to charge compensation. However, it is my opinion that Mrs. M's circumstances, in which her account showed a debit balance and the sale of her house by her mortgagees was imminent, warranted the exercise of the Public Trustee's discretion under section 55 of the Mental Health Act to forego compensation in cases of poverty or hardship.

Whatever legal effect the release may have upon Mrs. M's affairs, in my opinion such a release has no legal effect upon my statutory authority as Ombudsman to form the conclusion that the Public Trustee was unreasonable in not exercising his discretion to forego compensation.

Finally, I had tentatively concluded that the Public Trustee was unreasonable to have failed to carry out the sale of Mrs. M's house before relinquishing control of her finances, and had tentatively recommended that he compensate her for the judgment interest she must now pay.

In his April 24, 1986 letter, Mr. McComiskey explained that part of his delay in proceeding with the recommended sale was due to a one-month grace period granted to members of Mrs. M's family, who had requested the opportunity to sell Mrs. M's chattels privately. Mr. McComiskey does not seem to have acted unreasonably in permitting the family to carry out this sale, thereby avoiding further cost to Mrs. M of the time of the Public Trustee's staff. The one-month grace period does not seem unduly lengthy.

Mr. McComiskey also mentioned that his office was advised by letter dated April 10, 1984 from Mrs. M's daughter that the house had been emptied the preceding weekend and that within days of receiving that letter, he learned that Mrs. M had been examined and was considered competent to manage her own affairs. The notice of cancellation of her certificate of incompetence was dated May 2, 1984.

I agree with Mr. McComiskey's statement that his office ought not to have commenced sale of her house after Mrs. M's certificate of incompetence was cancelled. However, it remains my opinion that the Public Trustee delayed unduly in taking steps to initiate sale proceedings, with the critical period being between mid-February 1984, when sale was approved, and mid-April 1984, when it was learned that Mrs. M's certificate of incompetence was about to be cancelled, particularly when his own failure to make mortgage payments and the mortgagees' request for an appraisal should have alerted him to the likelihood of sale or foreclosure by the mortgagees.

While I believe compensation for Mrs. M's loss due to this delay by the Public Trustee would be in order, it does not seem possible to quantify this loss. Initially, I had suggested that the Public Trustee might reimburse Mrs. M for the judgment interest she must now pay her mortgagees, but I no longer consider that the causal connection between the Public Trustee's delay and the interest owing is sufficient to justify my making a recommendation in that regard. If the Public Trustee had proceeded to list Mrs. M's house, it is by no means a certainty that a sale would have been carried out before the Public Trustee's loss of jurisdiction.

In summary, then, my Office's investigation does not indicate to me that the Public Trustee acted improperly in paying Mrs. M's taxes rather than her mortgage, or that his office unreasonably continued to control Mrs. M's assets after notifying her that its jurisdiction had terminated. However, I believe the following conclusions and recommendations to be appropriate:

Conclusions:

(1) That the Public Trustee unreasonably refused to permit an appraisal of Mrs. M's property, thereby prejudicing her ability to determine whether fair market value had been obtained upon its sale. [Reference: Ombudsman Act, s. 22(1)(b)]

(2) That the Public Trustee was unreasonable to have levied compensation of $750, creating a debit balance in Mrs. M's finances. [Reference: Ombudsman Act, s. 22(1)(b)]

(3) That the Public Trustee was unreasonable to have failed to take steps to carry out the sale of Mrs. M's house between mid-February 1984, when that sale was approved, and mid-April 1984, when he first learned that Mrs. M would soon be declared competent. [Reference: Ombudsman Act, s. 22(1)(d)]

Recommendations:

(1) That in cases where the sale of real property is inevitable, the Public Trustee facilitate the sale by obtaining or allowing mortgagees to obtain appraisals of the property. [Reference: Ombudsman Act, s. 22(3)(d)]

(2) That this is an appropriate case for the foregoing of Public Trustee compensation, as provided for in section 55 of the Mental Health Act, and that Mrs. M should accordingly be reimbursed $750, with interest. [Reference: Ombudsman Act, s. 22(3)(g)]

My final conclusions and recommendations were reported to the Public Trustee on October 3, 1986. As the Public Trustee failed to respond to my report within a reasonable time, on November 28, 1986, acting pursuant to my discretion under section 22(4) of the Ombudsman Act, I referred the matter to the Premier. Since that time, on December 4, 1986, I received the Public Trustee's response to my findings. As it appears that he does not intend to take appropriate action to resolve Mrs. M's concerns, I have forwarded a copy of this further correspondence to the Premier as well.

DETAILED SUMMARY NO. 4

Mr. V's complaint was originally brought to the attention of my Office by a letter dated October 7, 1985 from Mr. U, Mr. V's lawyer. Mr. V met with Ms. Janet Ortved, an investigative researcher with my Office on October 23, 1985, at which time he elaborated on his concerns. On November 8, 1985, Mr. V's file was assigned to a member of my investigative staff for investigation.

On November 27, 1985, in accordance with section 19(1) of the Ombudsman Act, we notified the Public Trustee, Mr. A.J. McComiskey, of our intention to investigate Mr. V's complaint. In that letter, we invited Mr. McComiskey to provide a statement of his Office's position regarding Mr. V's concerns.

Mr. McComiskey responded to our request by letter dated December 11, 1985. On January 6, 1986, we sent a copy of that letter to Mr. V and to his lawyer, Mr. U, requesting their comments thereon. We received Mr. V's comments on January 20 and February 19, 1986, and received Mr. U's comments on April 9, 1986.

In the course of our investigation, the following persons have been interviewed: Mr. V; his lawyer, Mr. U; the Public Trustee, Mr. McComiskey; and Public Trustee's Office Estates Officer Mr. A.C. Beltrano. The legislation empowering the Public Trustee to take action in Mr. V's case, the Public Trustee Act, R.S.O. 1970, c. 389 and the Mental Health Act, R.S.O. 1970, c. 269, as amended, and the regulations thereunder, have been reviewed. In addition, we have reviewed the Public Trustee's Office file on its handling of Mr. V's affairs.

After reviewing the information gathered during our investigation, and acting in accordance with section 19(3) of the Ombudsman Act, by letter dated December 22, 1986 I advised Mr. McComiskey that I was considering the following conclusion and recommendations, inviting him to make representations.

Possible Conclusion:

That the Public Trustee unreasonably omitted to ascertain the whereabouts of Mr. V's automobile and other personal effects in March 1974, when he received information indicating Mr. V's former address and suggesting that Mr. V was the owner of an automobile.

[Reference: Ombudsman Act, section 22(1)(b)]

Possible Recommendations:

(1) That the Public Trustee provide Mr. V with reasonable compensation for the loss of his personal belongings and his automobile.

(2) That in view of the Public Trustee's unreasonable delay in attempting to locate Mr. V's belongings, compensation paid to the Public Trustee by Mr. V be reimbursed with interest.

(3) That in future cases, the Public Trustee make all reasonable attempts to locate a patient's assets which would include, as a minimum, writing to a former landlord to inquire about any assets on the premises.

[Reference: Ombudsman Act, section 22(3)(g)]

This possible conclusion and these possible recommendations were based on the following information.

On February 1, 1974, Mr. V was admitted to a psychiatric hospital, and on March 21, 1974 he was certified incompetent. The certificate of incompetence was issued pursuant to the Mental Health Act, R.S.O. 1970, c. 269; section 34 of that Act required the Public Trustee to assume committeeship upon receipt of a certificate of incompetence, as occurred in this case. Mr. V's certificate of incompetence stated his address, where he rented a room and parked his automobile. The day after the certificate was issued, March 22, 1974, Mr. V's landlord had his automobile towed to a pound operated by a towing service.

The office manager of the psychiatric hospital wrote to the Public Trustee's Office in Mr. V's regard on March 26, 1974. That letter's enclosures included the certificate of incompetence, a notice of admission, a financial statement which was blank except for Mr. V's address, a credit union passbook, a bank passbook, a motor vehicle permit and eight keys. By letter dated April 5, 1974, Richard D. Madden, an Estates Officer with the Public Trustee's Office, asked the administrator of the psychiatric hospital for details of Mr. V's assets, noting that Mr. V had not indicated on his financial statement any friends or relatives who might assist in establishing those assets. Mr. A.C. Beltrano, Assistant Estates Officer, reiterated Mr. Madden's request in a letter dated May 14, 1974. On August 26, 1974, a social worker at the psychiatric hospital wrote to Mr. Beltrano to advise that the requested information was not available.

On October 9, 1974, the towing service sold Mr. V's car for $450. Towing and storage costs to September 30, 1974 had been $591. Mr. V's clothes and household or personal effects which had been contained in the car were sent to a local charitable organization and the cheques and personal papers in the car were destroyed by one of the drivers with the towing service.

On November 21, 1974, the Public Trustee's Office received an undated letter from Mr. V, in which he requested information concerning his belongings.

Assistant Estates Officer Beltrano completed a Request for Investigation on November 27, 1974, stating that "Mr. V recently communicated with us requesting information concerning his belongings. This would indicate that he must have personalty somewhere, presumably at his former address ... and in this regard, it would be appreciated if an

investigator would attend at this address to determine whether in fact he had any personal effects there...."

As an apparent result of Mr. Beltrano's request, an investigation was commenced. On January 21, 1975, one of the Public Trustee's investigators attended at Mr. V's former address, a rooming house, where he was advised that the former owners had moved to another town and that the present owners had purchased the premises in March, 1974, after Mr. V was hospitalized.

The investigator spoke with Mr. V's former landlord on February 11, 1975. She advised that when she and her husband left the rooming house in March of 1974, Mr. V's automobile and personal effects were placed in the custody of the local police. The Public Trustee's Office subsequently learned, by letter dated August 22, 1975, from the owner of the towing service that Mr. V's car, a 1968 Ford Falcon, had been towed to their pound as an abandoned car on March 22, 1974, as has been stated above. The owner also advised at that time of the automobile's subsequent sale.

In response to a June 7, 1976 request from Mr. V for information respecting his belongings, on June 29, 1976, Assistant Estates Office W.F. Bentley wrote to Mr. V to advise that the Public Trustee's Office unfortunately had no record of his belongings. Attached to this was a letter from Mr. Bentley to the social worker at the psychiatric hospital, explaining that Mr. V's personal belongings had been in his car and that the latter had been sold. Mr. Bentley suggested that the social worker might wish to advise Mr. V of this.

On May 26, 1977, Mr. V was discharged from hospital and the Public Trustee's authority to act on his behalf ended, pursuant to what was then section 38 of the Mental Health Act.

From the above information, it appeared to me that by March 1974 the Public Trustee's Office had been informed of the address of the rooming house that Mr. V had lived at prior to his hospitalization, and that the Public Trustee had received information (a motor vehicle permit, keys, a driver's licence, a car insurance certificate and car ownership papers) sufficient to indicate that Mr. V most likely owned an automobile. From this information, it would have been reasonable to conclude that Mr. V probably had personal effects at his place of residence and that he owned a car. Therefore, I was not persuaded by the explanation offered in the Public Trustee's December 11, 1985 letter to my Office, in which he indicated that the loss of Mr. V's belongings could be attributed to his inability on admission to hospital to provide any information about his affairs or as to friends or relatives who could be contacted in that regard.

Mr. V has advised my staff that he believes that the first step in tracing his belongings should have been for the Public Trustee's staff to speak to his landlord or to someone else at his home address to determine whether there were any assets on the premises requiring safekeeping. This seemed to be a reasonable contention, and a sensible

step to have taken, given that Mr. V evidently had no friends or relatives who were able to supply information on his behalf about his belongings.

My staff has questioned Mr. Al Beltrano, the Estates Officer with the Public Trustee's Office who handled Mr. V's file, about that Office's general practice in cases such as this, in which a patient is unable to provide information about his assets, and has no friends or relatives who might assist. Mr. Beltrano explained that if a patient provides an address of a rental unit, a member of the Public Trustee's staff would usually write to the landlord. However, even if a patient does provide an address, it may be perceived that he or she has been moving frequently from rooming house to rooming house. It must therefore be confirmed that there are assets at the patient's former residence before it will be considered worth the expense to the patient of sending a field worker to investigate.

In view of this practice, which we have been advised is a matter of internal policy, it appeared to be unreasonable that even the preliminary step of writing to the landlord was not taken. It seemed to me that in this case the Public Trustee's Office had available from the date of assuming control of Mr. V's assets information sufficient to suggest, at least, ownership of an automobile. Although I agreed that the Public Trustee should attempt to minimize expenses to be borne by an estate, a concern that investigator's fees should not be expended at the outset of his committeeship over Mr. V seems unduly cautious. The cost of an investigation could readily have been borne by this estate, as I am advised that Mr. V's bank accounts and cash on hand alone totalled some $13,000.

Unfortunately, I have had some difficulty in ascertaining the value of the belongings Mr. V lost. Mr. V has given us an inventory of these possessions, including his car, stating their total value as $37,666.25. I sent a copy of this list to Mr. McComiskey with my letter of December 22, 1986. Mr. V's lawyer, Mr. U, has been unable to enlighten us as to the accuracy of Mr. V's estimate. I note, however, that Mr. V's six-year-old car, a 1968 Ford Falcon 4-door sedan, was sold for $450.

In the circumstances, I was tentatively of the view that the Public Trustee should provide Mr. V with reasonable compensation for his loss, and, in view of the Public Trustee's Office's unreasonable delay in attempting to trace Mr. V's belongings, that Mr. V be reimbursed the $945 in Public Trustee compensation charged to him. I also suggested that in future the Public Trustee take greater care in attempting to trace patients' assets.

In my letter to the Public Trustee of December 22, 1986, I commented on the following matters, which had formed a part of Mr. V's complaint, but respecting which I was not then prepared to make any recommendations.

First, Mr. V questioned the Public Trustee's disbursements from his account, namely, $650 for allowances, $500 for "balance at credit", $40 for Public Trustee special services, $10 for an income tax fee and $945 for Public Trustee compensation to date of discharge.

Mr. McComiskey explained these sums in his letter to my Office of December 11, 1985, and the explanations have been confirmed by my investigator's examination of Mr. V's file. It appears that the $650 represented three allowance payments sent to Mr. V on February 3, 1977 ($200), March 12, 1977 ($200) and May 12, 1977 ($250). The $500 was a sum sent to Mr. V on June 14, 1977, to tide him over until his assets were released. The $40 was an investigator's fee for attending at Mr. V's residence and the $10 was charged for preparation of Mr. V's income tax returns.

The $945 for Public Trustee compensation was calculated in the following manner. The Public Trustee's file on Mr. V's estate shows that, in general terms, of an estate's receipts, the Public Trustee takes as compensation 1% of bank accounts and cash, 2 1/2% of income, 2% of capital and 5% of Old Age Security benefits. On the side of disbursements, he takes 2 1/2% of income and 2% of capital. In addition, the Public Trustee levies 1/4 of 1% per annum for management, and from assets on hand, 1% of bonds and stocks, 1% of real estate, 1% of mortgages, 1/2 of 1% of life insurance, 1% of miscellaneous assets and 1% of cash.

In Mr. V's case, there were bank accounts and cash of $13,819, so that Public Trustee compensation from that sum was $138.19. His income was $13,257, 2 1/2% of which was $33.43. His income on the disbursement side was $756, from which Public Trustee compensation was $18.19. Management fees of $200.68 were levied. Mr. V's bonds and stocks were valued at $1.00, 1% of which was one cent. He had miscellaneous assets on hand totalling $153, 1% of which was $1.53 and finally, he had cash assets on hand of $25,580, 1% of which was $255.80. Therefore, total Public Trustee compensation was $946.54, which was rounded off to $945.

I did not propose to conclude that the amounts of or the reasons for the Public Trustee's deductions from Mr. V's account were unreasonable. However, I did state that it was my belief that undue delay in attempting to trace Mr. V's belongings merited reimbursement to him of the Public Trustee compensation he had to pay.

Secondly, Mr. V has contended that the Public Trustee acted unreasonably by removing his funds from his bank accounts and transferring them to his own hands. I was not prepared to make a finding to that effect. It appeared to me that in that instance the possible loss of interest by the patient is counterbalanced by the increased convenience and lower transaction costs of drawing the patient's funds into a pool from which his or her needs can be met by the Public Trustee's Office. In addition, should the patient have an emergency need,

presumably funds would be more readily available to the Public Trustee than if they had not been transferred.

Finally, Mr. V has contended that the Public Trustee acted unreasonably by failing to pay interest between June 30, 1977 and the date of release of his assets, September 1, 1977.

We have learned that, at the relevant time, the Public Trustee's Office paid interest on a patient's quarter-yearly balance and that this interest was credited to the patient's account twice yearly, in March and September. As an additional quarter passed after the final accounting in Mr. V's case, which took place in March of 1977, he received interest for the months of April, May and June. His funds were released on September 1, 1977, before another quarter elapsed.

At the time, the payment of interest by the Public Trustee's Office would have been governed by section 5 of Regulation 761 (under the Public Trustee Act), R.R.O. 1970, as amended by O.Reg. 438/74 and O.Reg.520/76. That section reads, in part, as follows:

> (1) Interest shall,
>
> (a) subject to subsections (2),(3) and (4) be credited to money in the hands of the Public Trustee on and after the 1st day of April, 1968 at the rate of 6 per cent per annum on the minimum quarterly balance exceeding $500. [This paragraph was amended in 1976 to credit interest on money in the hands of the Public Trustee on and after the first day of April, 1976 at the rate of 7 per cent per annum on the minimum quarterly balance exceeding $500.]
>
> (b) be computed from the first day of the month next following the month in which the money was received by the Public Trustee to the last day of the latest completed quarter before the date on which the money is available for payment to the person entitled thereto; and
>
> (c) be added to each account and computed at the end of each half of the fiscal year.

I advised Mr. McComiskey that for the above-noted reasons, I was not prepared at that time to make any recommendations on Mr. V's contentions respecting interest and disbursements other than in relation to the issue of delay.

By letter dated January 5, 1987, I provided Mr. V with a summary of the results of our investigation to date. I sent a copy of this letter to Mr. V's lawyer, and both his and Mr. V's comments were requested. Mr. V provided his response by letter dated February 6, 1987, in which he reiterated some of the concerns he had expressed earlier.

The Public Trustee, Mr. McComiskey, responded to my tentative findings in this case by a letter dated January 27, 1987. Briefly, Mr. McComiskey indicated that Mr. V's was an unusual case, as there were no friends or relatives available to provide details of his assets. The hospital was not of much assistance, giving the Public Trustee's Office only the documents which Mr. V had in his possession on hospitalization, and Mr. V's former landlord unilaterally terminated his tenancy and disposed of his personal effects and his automobile before the Public Trustee's Office received Mr. V's certificate of incompetence.

Mr. McComiskey noted that his Office received Mr. V's motor vehicle permit, but not his driver's licence and insurance certificate, although these things are usually carried together. In addition, the police and Mr. V's landlord never informed the Public Trustee of the existence of Mr. V's automobile, nor did Mr. V do so himself prior to his March 1985 letter to former Director of Crown Attorneys and current Deputy Attorney General, Mr. Richard Chaloner.

Finally, Mr. McComiskey indicated that Mr. V had been entitled to request that the Public Trustee's accounts be passed, but that he did not do so, choosing instead to sign a release form before the Public Trustee's Office returned his assets to him. In view of the fact that it remains open to Mr. V to sue the Public Trustee's Office for the value of his goods, Mr. McComiskey stated that it would be imprudent for him to accept my suggestion that he reimburse Mr. V.

Mr. McComiskey is correct in stating that Mr. V's circumstances were unusual to the extent that less information about his assets may have been available than is normal. However, in such a case, it would seem to me to be all the more appropriate for the Public Trustee to carefully check out the origin of the patient's keys and motor vehicle permit. While the Public Trustee may have a valid concern about wasting a patient's money on a fruitless search, at least some minimal steps could have been taken. For example, the Public Trustee did have Mr. V's address, so that a member of his staff might have telephoned or written to the former landlord.

The fact that the landlord had already taken steps to remove Mr. V's belongings before the Public Trustee received the certificate of incompetence is beside the point. Mr. V's car and belongings were not disposed of by the towing service until some months later, in October of 1974. If the Public Trustee's Office had acted more expeditiously, it could probably have prevented this loss.

The fact that Mr. V had a motor vehicle permit of itself should have been sufficient to suggest that he might own an automobile; the absence of a licence and an insurance certificate should not have been treated as determinative. In addition, the failure of the police and the landlord to inform the hospital of the whereabouts of the car should not absolve the Public Trustee of any duty to act when he has information to suggest that a patient may own an automobile, nor should the patient's

own failure to do so, particularly when, as in this case, his medical condition hampered him from doing so.

With respect to Mr. McComiskey's argument pertaining to the release form signed by Mr. V, it appears to me that if Mr. McComiskey intends to hold out a release signed by a patient as being legally binding, he is estopped in this case not only from saying that Mr. V could request a passing of accounts, but also from suggesting that it is still open to him to sue the Public Trustee for the value of the goods he has lost. In any event, it has always been the policy of our Office that complainants not be required to exhaust their court remedies before we will proceed to investigate their concerns.

For the foregoing reasons, and taking into account the representations of both parties to this complaint, it is my opinion that my tentative findings should be finalized, as follows.

Conclusion

That the Public Trustee unreasonably omitted to ascertain the whereabouts of Mr. V's automobile and other personal effects in March 1974, when he received information indicating Mr. V's former address and suggesting that Mr. V was the owner of an automobile.

[Reference: Ombudsman Act, section 22(1)(b)]

Recommendations

(1) That the Public Trustee provide Mr. V with reasonable compensation for the loss of his personal belongings and his automobile.

(2) That in view of the Public Trustee's unreasonable delay in attempting to locate Mr. V's belongings, compensation paid to the Public Trustee by Mr. V be reimbursed with interest.

(3) That in future cases, the Public Trustee make all reasonable attempts to locate a patient's assets which would include, as a minimum, writing to a former landlord to inquire about any assets on the premises.

[Reference: Ombudsman Act, section 22(3)(g)]

I sent my report, containing my final conclusion and recommendations in this case, to the Public Trustee on February 20, 1987. As in my opinion the Public Trustee did not respond to this report within a reasonable time, by letter dated March 23, 1987, I advised the Premier of my findings. Since that time, on March 24, 1987, I have received the Public Trustee's response, which in my opinion indicates that he does not intend to take appropriate action to resolve Mr. V's concerns. Accordingly, I have forwarded a copy of this response to the Premier.

DETAILED SUMMARY NO. 5

Mrs. W's complaint is against the Public Trustee and he was notified of our receipt of this complaint on October 30, 1984. She complained that the Public Trustee should not have been involved in the committeeship of the estate of her mother, Mrs. B. Mrs. W therefore objected to the payment of any compensation to the Public Trustee.

Mrs. W also complained that once involved the Public Trustee did not properly administer the estate. In particular, Mrs. W complained about the manner in which the Public Trustee handled a mortgage which was the principal asset of the estate. Mrs. W contended that the Public Trustee was slow to credit monthly mortgage cheques and it should have renewed the mortgage when it fell due. Mrs. W also complained that the amount of compensation charges was excessive. I am not supporting this aspect of Mrs. W's complaint for reasons I have explained in a separate report to her.

Following my investigation into this complaint, I wrote to Mr. McComiskey, the Public Trustee, on February 27, 1986, pursuant to section 19(3) of the Ombudsman Act to inform him that I was considering making the following conclusion and recommendation:

Possible Conclusion:

The Public Trustee's actions as committee of the estate of Mrs. B were based wholly or partly on a mistake of law or fact, as the appropriate procedures under the Mental Health Act were not followed to empower him to act as committee.

[Reference: Ombudsman Act, section 22(1)(c)]

Possible Recommendation:

The Public Trustee should reimburse Mrs. W for all compensation charges other than disbursements, for his committeeship of the estate of Mrs. B.

[Reference: Ombudsman Act, section 22(3)(g)]

I indicated to Mr. McComiskey that I based my possible conclusion and recommendation on the following information which I had gathered as a result of my investigation to that point.

Mrs. B was admitted to a general hospital in Ontario (one which is also a designated psychiatric facility under the Mental Health Act, R.S.O. 1980) on January 1982, following a stroke. She remained there, until January 7, 1983 at which time she was discharged to an Ontario nursing home. Prior to her admittance to hospital her daughter, Mrs. W,

had taken up residence with her mother. Mrs. W had previously been living in the United States with her aged husband.

Mrs. W maintains that she had been taking care of her mother's affairs since 1958 or 1959. She indicates that her mother had executed several powers of attorney over the years in her favour and Mrs. W had transacted her mother's affairs pursuant to these powers of attorney. An official at the bank at which her mother did her banking confirmed to our Office that the daughter, even when resident in the United States attended at the bank to transact her mother's affairs.

Mrs. W has produced a power of attorney executed in 1980, a copy of which had been filed with her mother's bank. In addition, this power of attorney had been registered in the land registry office for the purposes of a mortgage transaction. The latter transaction apparently involved the mother lending money and taking a mortgage as security. The mortgage was in the amount of approximately $70,000 and was the chief asset of Mrs. B's estate. The mother and daughter had a joint bank account to which the monthly mortgage payments were deposited. They also were jointly liable for a loan to the bank in the amount of approximately $4,000.

Section 36 of the Mental Health Act requires that "forthwith upon the admission of a patient to a psychiatric facility, a physician shall examine the patient to determine whether or not he or she is competent to manage his or her estate". (My emphasis) The Act also provides that the patient can be examined at any time to determine competency. Section 36 then requires that where there has been this examination the physician shall enter his determination on the clinical record and, if the opinion is that the patient is not competent to manage his/her estate, a certificate of incompetence shall be issued in the prescribed form and the officer in charge shall transfer the certificate to the Public Trustee. According to section 38 the Public Trustee only becomes the committee of the estate upon receipt of the certificate of incompetence, assuming some other procedure prescribed by the Act was not followed. (My emphasis)

Section 41 then requires that where the Public Trustee is managing the estate, the patient shall be examined prior to discharge from a psychiatric facility to determine competency and if the opinion is that the patient is not competent the attending physician shall issue a notice of continuance in the prescribed form and this shall be forwarded to the Public Trustee.

Section 42 provides that the Public Trustee ceases to be committee and shall relinquish management upon receipt of notice of discharge of the patient unless he has at that time received a notice of continuance; or upon the expiration of six months after the discharge of the patient where a notice of continuance was received.

Section 56 provides that where a person with respect to whom a notice of continuance has been received by the Public Trustee may not be

competent to manage his or her estate upon the termination of the committeeship, the Public Trustee can apply to the Court for directions and the Court may in its discretion order that the Public Trustee continue to manage the estate.

I indicated to Mr. McComiskey that my understanding of these provisions, in simple terms, was that when a person is admitted to a psychiatric hospital there should be a competency examination forthwith. If the patient is not competent to manage his/her affairs then a certificate of incompetence should be issued and forwarded to the Public Trustee who would then become the committee of the estate. If the Public Trustee wants to retain committeeship after the discharge of the person from the hospital, a notice of continuance must be issued following a further competency examination prior to discharge. The notice of continuance expires in six months. If the Public Trustee were to continue to be involved beyond this six month period, then the Public Trustee must apply to the Court for an order to continue its involvement.

As I understand it, what happened in the case of Mrs. B was as follows. She was admitted to a designated psychiatric facility. She does not, however, appear to have been examined "forthwith" pursuant to section 36. She was admitted in January of 1982 and apparently on her last day in hospital, on January 7, 1983, she was examined pursuant to section 41 and a notice of continuance was issued, dated January 8, 1983, one day after the date of discharge. The date of examination is not set out in the notice which was also not issued in prescribed form. In addition a certificate of incompetence pursuant to section 36 had not previously been issued. A certificate of incompetence was issued based on the examination on January 7, 1983 but the certificate was dated January 12, 1983, five days after the date of discharge, and four days after the date of the notice of continuance.

In addition the notice of continuance expired six months after the date of discharge on July 7, 1983. At that time the Public Trustee ceased to be the committee of the estate of Mrs. B. A section 56 order from the Court was not obtained until February 1984, more than six months after the committeeship had expired. The court sanctioned the Public Trustee's involvement for a further six months.

I suggested to Mr. McComiskey that it appeared to me that the technical requirements of the Mental Health Act were not followed in the case of Mrs. B and this called into question the Public Trustee's authority to act as the Committee of the estate.

To complicate matters, at the time of the purported assumption of committeeship by the Public Trustee, there existed a valid power of attorney in favour of Mrs. B's daughter, Mrs. W. In January of 1983 the Mental Health Act provided that upon the Public Trustee becoming committee of the estate of a person, every power of attorney of such person is void. Accordingly, if the Public Trustee was legally the committee then Mrs. W's power of attorney would have been void. In

December 1983, however, the Mental Health Act was amended as was the Powers of Attorney Act, and the amendments provided that if a power of attorney had the appropriate language it need not become void in a mental incompetency situation. Whether or not these amendments could retroactively revive Mrs. W's power of attorney assuming it had been legally voided upon the Public Trustee becoming committee, does not, in my view, need to be answered. I indicated to Mr. McComiskey that it was my tentative view that the Public Trustee did not properly become the committee of Mrs. B's estate and therefore Mrs. W's power of attorney may have always remained valid and in force.

From the beginning of the Public Trustee's involvement, Mrs. W complained about it. She contacted the Public Trustee's office many times throughout the course of its administration of Mrs. B's estate and complained that the estate could not afford the Public Trustee's compensation fees and regretted the fact that she was not in control of her mother's estate. Mrs. W maintains that from the beginning she advised the Public Trustee of the existence of her power of attorney; but, of course, at that time, the law provided that once the Public Trustee assumed committeeship, any powers of attorney were void. In any event the Public Trustee's office maintains that it did not become aware of the power of attorney until the summer of 1984, more than 1 1/2 years after it became the committee. However, when Mrs. W contacted our Office in May of 1983 to complain about the Public Trustee's involvement she told members of my staff of the existence of the power of attorney. In fact there is a memo in our file prepared by a Research Officer on my staff, which sets out a discussion she had with Mr. Bentley, the Estates Officer handling the matter at the Public Trustee's office, which took place on June 20 and 23, 1983. The memorandum notes that the existence of the power of attorney was discussed with Mr. Bentley.

Mrs. W was advised by officials at the Public Trustee's office that if she was not satisfied with the Public Trustee's involvement she could bring an application under the Mental Incompetency Act to be declared a private committee or make submissions in the section 56 proceedings under the Mental Health Act. This would, of course, involve the assistance of a lawyer which Mrs. W maintains she could not afford. In any event she did not feel that she should be put to this trouble and inconvenience as she had been handling her mother's affairs for many years and could not understand why the Public Trustee needed to be involved at this point.

I did advise Mr. McComiskey that I recognized that as a result of Mrs. W's persistent complaints and the existence of the power of attorney, the Public Trustee waived $1,000 of its compensation charges.

On March 21, 1986 I received the response of Mr. McComiskey to my tentative conclusion and recommendation. Mr. McComiskey indicated that even if the dating of the documentation was wrong, the Public Trustee has no right to question the dating. According to Mr. McComiskey by statute, the Public Trustee is appointed committee merely upon receipt

of a certificate or notice specified under section 38 of the Act. Mr. McComiskey believes that our arguments rest on the technical irregularities in the hospital documentation which are really a matter for consideration by the Ministry of Health but which are not of sufficient significance to destroy the statutory mandate imposed on the Public Trustee. Mr. McComiskey believes that our interpretation is contrary to the spirit of the Mental Health Act and is also contrary to the clear wording in section 38 of the Act which, Mr. McComiskey believes, was in due course confirmed by the order of the Court.

I have given serious consideration to Mr. McComiskey's comments. On balance, however, I must support the complaint of Mrs. W, for the reasons set out below.

It is my view that the Mental Health Act was not complied with so as to allow the Public Trustee to assume the committeeship of Mrs. B's estate. I do not believe that section 38, which provides that the Public Trustee is the committee of the estate of a patient upon receipt of a certificate of incompetence, protects the Public Trustee. At the time of the issuance of the certificate of incompetence Mrs. B was discharged from the hospital and was not a patient. Therefore there was no valid certificate issued or received by the Public Trustee to enable it to legally assume committeeship. Further, the notice of continuance was issued after the discharge, prior to the certificate of incompetence, and on the wrong form.

Nor do I think that it is contrary to the spirit of the Mental Health Act to insist that the Act be strictly complied with. It is my belief that the legal consequences of applying the Act are so grave that only strict statutory compliance should be countenanced by the Public Trustee. I think that the courts would support this view and an example of this is the case of Re Bowyer [1930] O.L.R. 379, which dealt with the case of a woman confined to a provincial hospital pursuant to the Hospitals for the Insane Act R.S.O. 1927. There was a deficiency in the certificates which formed the basis of the confinement and the Judge wrote at page 380:

> It has been held that the statutory certificates are an essential matter, and that which is made necessary by the statute is essential in order that there may be statutory authority for the custody of the patient.
>
> The case of Regina v. Pender (1855) 24 L.J.Q.B. 148, is based upon somewhat similar but not identical legislation, and determines that any defects in compliance with that which is required by the statute is fatal and that it is not open to the court to enter into a discussion as to the materiality of that which is lacking, once it is shown to be required by the statute.

In the case of Burke v. Efstathianos 27 D.L.R. (2d) 518, which was a decision of the Manitoba Court of Appeal, the Court dealt with an

action for false imprisonment by a patient who had been admitted to the hospital by a nursing supervisor rather than the superintendent of the hospital as required by the Mental Diseases Act, R.S.M. 1954, c.161. The Court found for the patient although it noted that this was a very technical violation of the Act. The Court noted that the procedure followed was not authorized under the statute and "that fact is decisive of the issue". The Court further noted that "it must be recognized that statutory requirements protecting the liberty of the subject cannot be disregarded".

In the case of Mrs. B, it would appear that the Public Trustee was aware of the irregularities in the certificates and in fact attempted to have the certificates corrected. It also appears that Mrs. W from the outset complained about the Public Trustee's involvement to the Public Trustee and the Public Trustee was aware at an early time of the existence of Mrs. W's power of attorney. In these circumstances it may have been appropriate for the Public Trustee, with its knowledge of the irregular certificates, to allow Mrs. W to administer her mother's affairs pursuant to the power of attorney.

These, therefore, are my final conclusion and recommendations:

Conclusion:

The Public Trustee's actions as committee of the estate of Mrs. B were based wholly or partly on a mistake of law or fact, as the appropriate procedures under the Mental Health Act were not followed to empower it to act as committee.

[Reference: Ombudsman Act, section 22(1)(c)]

Recommendations:

(1) The Public Trustee, at the earliest possible opportunity, should verify that he has the correct documentation to proceed with a committeeship.

(2) The Public Trustee should reimburse Mrs. W for all compensation charges other than disbursements, for its committeeship of the estate of her mother Mrs. B.

[Reference: Ombudsman Act, section 22(3)(g)]

My report was sent to the Public Trustee on June 25, 1986.

On September 9, 1986, I received a letter from Mr. Brock Grant, Executive Coordinator of the Legal Services Branch, Ministry of the Attorney General. He enclosed a copy of a draft response from the Deputy Attorney General to my final report, suggesting that the legal issues

involved in the case be resolved by way of a passing of accounts by the Public Trustee before a Judge of the Surrogate Court.

I responded in a letter dated September 22, 1986 to Mr. Grant indicating that I could not agree to the Ministry's proposal to resolve the matter in this way as I felt the Ombudsman has neither the standing nor the authority to instruct counsel to represent the complainant as Mr. Chaloner was proposing. I suggested, as an alternative, that the Ministry retain a lawyer for the complainant to argue the issue in court. I noted that if the Ministry agreed to this, I would consider it an adequate and appropriate response to my report.

In response to my letter of September 22, 1986, Mr. Grant indicated that the Ministry had real reservations about becoming involved in the retention of a lawyer on behalf of the complainant. However, Mr. Grant proposed another possible resolution, which was to have the matter referred to some form of binding arbitration utilizing the services of an eminent estates lawyer, and have my Office argue in favour of the legal position put forward in my final report.

My counsel responded on my behalf in a letter dated December 8, 1986. The letter set out my position that the suggested resolution as described in the above paragraph was not part of the process that is legislatively sanctioned in the Ombudsman Act to deal with a recommendation made in a final report of the Ombudsman. It was noted that the appropriate process was for the Ombudsman to report in his Annual Report on those cases in which a governmental organization does not implement his recommendations and the matter is then usually discussed before the Standing Committee on the Ombudsman. The letter further indicated that if additional comments were not received by my Office within one week, we would assume that the Ministry did not intend to implement the recommendations in my report and I would then send a copy of the report to the Premier pursuant to section 22(4) of the Ombudsman Act.

By January 5, 1986 no comments by the Ministry were received so on that date, I forwarded a copy of my report to the Premier. I received a letter acknowledging receipt of my letter from the Premier on February 12, 1987.

DETAILED SUMMARY NO. 6

On October 18, 1984, the Office of the Ombudsman received a letter from two complainants, Mr. QQ and Mr. RR, then inmates at a regional detention centre. The complainants complained that while in the Protective Custody Unit there, they had been subjected to a number of assaults by fellow inmates. The duty correctional staff in that area apparently were unaware of the event.

Messrs. RR and QQ's complaint was assigned to a member of my investigative staff who attended at the detention centre on October 26, 1984, and interviewed the complainants. On that same day, my investigator gave notice of our intent to investigate Messrs. QQ and RR's complaint to Deputy Superintendent Hill, pursuant to section 19(1) of the Ombudsman Act.

Our investigation included interviews with the complainants, Superintendent Hildebrandt, Deputy Superintendent Hill, two Correctional Officers and a member of the maintenance staff, all at the detention centre. In addition, information was obtained through a review of the complainants' institutional files and the results of the investigation conducted into this incident by the Superintendent.

Our investigation revealed the following information.

On October 4, 1984, Messrs. QQ and RR were admitted to the detention centre, general population awaiting trial. Evidently, they were unpopular among the other inmates in the general population ranges. Mr. QQ was assaulted there and staff decided for the safety of the complainants, they should be placed in Unit 1 - Protective Custody. There the complainants shared Cell Number 4.

On October 11, 1984, while in the day room of the protective custody unit, they were attacked by inmates of that unit.

Following that incident, the complainants then requested, and were permitted by the officer in the control module, to enter their cell (Cell Number 4). Minutes later, without their requesting same, their cell door opened and they were confronted and assaulted by a number of other inmates who were armed with broom handles.

Two officers were on duty at this time and assigned to the area in question. Correctional Officer A was in charge of the Control Module and the operation of the electronically controlled doors. Correctional Officer B was assigned to patrolling the four ranges of this area, including the protective custody unit. Messrs. QQ and RR have stated that when their cell door closed behind them, they heard the electronic buzz of the lock engaging. However, they then heard other inmates calling out to the officer in the Control Module, "Cell time 4". This

call evidently was used when inmates wished a cell door to be opened, and the officer in the Control Module would then activate the electronic device to accomplish this. The opening of the cell door thus allowed their assailants to enter and attack them. It is stated by the complainants that this occurred on a number of occasions, enabling the assault to continue. It is apparent that Correctional Officers A and B both failed to observe any of these events, which we believe took place over a space of approximately forty-five minutes.

The complainants did not bring their injuries to the attention of any staff until the following day. It was then noted by the morning staff that blood was splattered on the wall and the floor of Cell Number 4. The complainants had suffered lacerations, swellings and abrasions on various parts of their bodies. They were not hospitalized, but received care at the Health Unit.

Superintendent Hildebrandt became aware of this occurrence and ordered an investigation. The complainants were interviewed and also the inmates who were alleged to have taken part in the beatings. Three inmates admitted to assaulting the complainants. Only one inmate was forthcoming with much detail. As previously mentioned, it would appear that the incident lasted approximately forty-five minutes with shouting and physical activity involving fighting among at least five participants in all. According to one of the accused, the fight took place in the day room and not in Cell Number 4.

As a result of the Superintendent's investigation, three inmates were charged and each was convicted of an institutional misconduct and sentenced to indefinite close confinement for assaulting Messrs. RR and QQ.

Upon reviewing the collective statements and investigative reports compiled by the staff at the detention centre, I note that Deputy Superintendent Hill commented that there was no doubt that an assault had taken place, but that the statements of the inmates differed significantly from those of the correctional officers on duty. Correctional Officers A and B recorded that nothing out of the ordinary was observed. In his report, Deputy Superintendent Hill stated that it was difficult to believe the officers' assertions that the evening had been uneventful.

Based on this, disciplinary meetings were convened by Superintendent H. Hildebrandt in order to determine whether or not disciplinary action should be taken against Mr. A or Mr. B, in response to the allegation that Mr. A had failed to exercise proper control of the cell doors and that Mr. B had failed to adequately supervise the area with the result that the complainants had been assaulted.

Mr. A is on record as having stated that he opened the door to Cell Number 4 only once at approximately 8:30 p.m. to allow the complainants to enter their cell. He stated that he did not open the

cell door again. He also commented, as did his Union representative in attendance at the disciplinary meeting, that the cell doors at times may close and the control module may indicate that the door is locked, whereas in fact, the locking device has not fully engaged. Mr. A stated that he did not see or hear anything out of the ordinary that night. Superintendent Hildebrandt stated in conclusion that there were sufficient differences in the inmates' statements as to where the assault took place, such that he found that the allegations against the officer could not be proven.

Mr. B is on record as having stated that he observed nothing unusual on the evening in question. However, he acknowledged that he had seen a non-protective inmate talk suspiciously with inmates of other ranges. Because of his suspicions, he stated that he had a notation entered into the special entry log. Apart from that one observation, Mr. B stated that he did not notice anything else out of the ordinary. Superintendent Hildebrandt concluded that he could not find that Mr. B had deliberately failed to carry out his duties or was aware of the assault. Therefore, it was Mr. Hildebrandt's opinion that the allegations were not proven.

During my investigation, comments were obtained from correctional staff and the maintenance worker at the detention centre that they were aware that the cell door locking devices and the electronic indicators in the Control Module had a history of error and incorrect signal.

It is apparent that the staff of the detention centre knew that Messrs. QQ and RR had been the subject of animosity from other inmates and for this reason they had been placed in the protective custody unit for safety. Even there, and prior to the incident at hand, they were subjected to an attack which caused them to request the safety of their own cell on the night in question.

Since it appeared to me that there was sufficient information to make conclusions and recommendations which would adversely affect the Ministry, a letter detailing the results of our investigation and my possible conclusions and recommendations was sent on August 6, 1986, to Mr. Robert M. McDonald, Deputy Minister of Correctional Services, pursuant to section 19(3) of the Ombudsman Act.

On September 24, 1986, 1986, our Office received Mr. McDonald's response. While Mr. McDonald acknowledged that this unfortunate incident had occurred, he could not agree with my possible conclusions. He stated that in respect to the alleged malfunctioning of the door to Cell Number 4 of the protective custody unit, it was his advice that since the opening of the detention centre in 1973, the cell doors in the maximum security area had functioned in such a manner that they could be opened electronically by the module operator, but must be closed manually to engage the locking mechanisms. He acknowledged that it was possible to obstruct the closing so that the cell doors appeared to be in the closed

or locked position on the control panel button; however, various tests conducted prior to and since this incident had shown staff that the cell doors were working properly according to design specifications.

Mr. McDonald commented on the allegation that the staff had omitted to adequately supervise the safety of these particular inmates, and noted that all participants in the incident evidently took every possible precaution to ensure that the staff on duty were not aware of the event. Further, Mr. McDonald noted that there was considerable evidence to indicate that the inmates had prevented staff from observing the altercation and, given the inmates' conflicting versions regarding this matter and the location of the assault(s), he could not agree that there had been a breach of duty or negligence on the part of staff in properly supervising the safety of the complainants.

While Mr. McDonald stated that it was evident that the complainants had been assaulted, he did not believe it was a result of any negligence on the part of the Ministry or its officials. Therefore, he expressed difficulty with my suggestion that Messrs. QQ and RR be paid compensation for pain and suffering and exemplary damages because of this event. Further, he expressed his concern generally about any recommendation from my Office for the payment of damages in such matters. He felt that this should be the function of the civil courts or Criminal Injuries Compensation Board. He confirmed information that had been previously provided to our Office, namely, that new procedures had been instituted to ensure even better control over the cell-time and lock-time activities and the movements in general in and out of the cells in the maximum security area.

In regard to Mr. McDonald's suggestion that the complainants may file an application with the Criminal Injuries Compensation Board for compensation as a result of the assault having taken place upon them by other inmates while in custody, or that the complainants may institute a civil action against their assailants, I do not believe that these suggestions are a necessary or proper alternative to my investigation at hand. My investigation focuses on the failure of the Ministry to ensure the safety of the complainants while in its custody, and possible recommendations for compensation payable by the Ministry in regard to its own responsibility in the matter. I think it is important to note that if the inmates had brought an application before the Criminal Injuries Compensation Board, such application would not directly deal with any possible failure by the Ministry to provide for the safe custody of the inmates while in custody and that, in my view, is a very important issue under consideration.

With respect to Mr. McDonald's comment that the complainants may still be able to commence a civil action against their assailants, I believe that it would be entirely unrealistic to suggest that they note that such an action may be beyond the complainant's means, and, in any case, the assailants may not have the financial means to satisfy a judgment awarded against them in the complainants' favour.

I am of the opinion that any recommendation from this Office for payment of compensation is appropriate; we have established many precedents for such payments under other circumstances.

Having considered the information obtained in our investigation, it is difficult for me to understand how such an altercation could take place and go unnoticed by reasonably observant staff member(s). I note that the two complainants were remanded into custody for an alleged sexual assault, of which they were subsequently acquitted. The animosity towards these two complainants was apparent to the staff of the detention centre when they were moved from the general population to the protective custody unit for their safety. While in protective custody, an incident occurred some time immediately prior to the matter at hand and because of that incident they requested cell-time, again for safety. Unfortunately, it became obvious that they did not obtain the safety they sought. The various staff spoken to by my investigators, and those who gave evidence at the Superintendent's disciplinary meetings, have stated quite clearly that on that occasion the cell doors and the electronic locking mechanisms were not completely reliable. Therefore, they could not be relied upon to provide protective custody for the complainants.

In my opinion, there was a lack of diligence and proper supervision to ensure the safety and welfare of these complainants. I believe it to be appropriate in the circumstances of this case that the Ministry provide compensation to each of the inmates, who were the victims of assaults by other inmates, since they had relied upon the protective custody offered by the institution.

Having reference to the Criminal Injuries Compensation Board Annual Reports of reported cases of innocent victims of assault sustaining similar injuries, compensation for pain and suffering in the sum of $1,500.00 for each inmate would appear to be appropriate.

In addition, I believe that additional compensation should be paid to each inmate in the sum of $500.00 for exemplary damages. My reason for this additional recommendation is that although the Ministry was aware of the problems with the locks in question, these inmates were placed in cells whose locks did not function properly. Therefore, Ministry staff must be taken to have been conscious of the probable consequences of their actions.

Having considered the results of our investigation, it is my conclusion, pursuant to section 22(1)(b) of the Ombudsman Act that the act of the staff in placing the complainants in a cell which was known to have a malfunctioning door without assuring that the door was adequately closed manually was unreasonable. It is my further conclusion that the staff unreasonably omitted to supervise the safety of the complainants adequately.

Accordingly, it is my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act that the Ministry should pay to the

complainants reasonable compensation for the injuries suffered as a result of their assaults which took place on October 11, 1984, at the detention centre. An amount of $2,000.00 should be paid to each complainant.

It is my further recommendation, made pursuant to section 22(3)(g) of the Ombudsman Act that the Ministry should inspect, assess, and carry out any engineering/mechanical alterations or adjustments necessary to the locking mechanism(s) of the cell doors in the protective custody range at the detention centre.

My final conclusions and recommendations were reported to the Ministry of Correctional Services on January 29, 1987. On March 23, 1987, acting pursuant to my discretion under section 22(4) of the Ombudsman Act, I referred the matter to the Premier. At that time I also forwarded my report to Messrs. QQ and RR.

DETAILED SUMMARY NO. 7

Mr. and Mrs. D first contacted my Office in a letter dated January 24, 1986 to register a complaint against the recommendation of the Review Committee for VRS/LD Placements and the subsequent decision of the Minister of Education and the Minister of Community and Social Services to place their son, Jason, with the local Board of Education for the 1985-86 school year.

On February 3, 1986 the Honourable Sean Conway, Minister of Education; the Honourable John Sweeney, Minister of Community and Social Services and Dr. Madeline Hardy, Chairperson of the Review Committee for VRS/LD Placements were advised of the Ombudsman's intention to investigate Mr. and Mrs. D's concerns. We advised that Mr. and Mrs. D were of the view that the Committee's recommendation was unreasonable as it was based upon imprecise and vague descriptions of the program offered by the Board. The complainants contended that in the absence of a detailed description of the proposed program, the Committee should have recommended the continuation of private school funding for this school year and until the Board proposes a detailed, working program to meet Jason's needs. Other contentions were made by Mr. and Mrs. D which I did not support and, for the purposes of this Report, are omitted.

We invited the Chairperson and the Ministers to provide my Office with any comments they wished to make on these contentions.

On March 19, 1986 we received a response from Mr. A.F. Daniels, Assistant Deputy Minister, on behalf of the Honourable John Sweeney, Minister of Community and Social Services. He advised that their Ministry no longer had jurisdiction to decide the appropriate placement for learning disabled children and therefore our letter notifying them of my intention to investigate this complaint was referred to the Honourable Sean Conway. Upon reviewing Mr. Daniels' letter, my staff made further inquiries with staff at the Ministry of Community and Social Services wherein we were advised that although the original intention, as indicated in Mr. Conway's announcement of August 1985, was that both Ministers would make a joint decision, the Minister of Community and Social Services had not taken an active part in the decision-making process respecting the placements and therefore would not be making any comments on the placement recommendations or decisions. My investigation with respect to the Ministry of Community and Social Services was therefore terminated.

On March 12, 1986, we received a letter from the Honourable Sean Conway, Minister of Education, in response to both letters sent to Mr. Conway and Dr. Hardy. A copy of this letter was sent to Mr. and Mrs. D on this date and they were invited to provide us with their comments. On April 1, 1986 we received written comments on the Minister's letter from Mr. and Mrs. D.

In the course of our investigation a member of my investigative staff met with Mr. Peter Wiseman, Acting Director of the Special Education Branch and Mr. Don Werner, Special Education Officer, both from the Ministry of Education; Dr. Madeline Hardy, Chairperson of the Review Committee for VRS/LD Placements and her Executive Assistant. A copy of Mr. and Mrs. D's file at the Review Committee offices was also obtained.

On February 14, 1986, my investigator toured the private school and met with the director. In addition, my investigator interviewed Mrs. B, a member of the Review Committee, and attended a half day workshop which Mrs. B hosted for teachers in North York. Mr. E, Special Education Consultant of the local Board of Education, was also contacted. Our investigation revealed the following:

Jason D is a fourteen-year-old learning disabled child. He has an attentional deficit disorder and has difficulty processing auditory and verbal information that is presented to him, and a weakness in mathematics. Since January 1984, Jason has been attending a private school which offers programs for pupils with learning disabilities. Mrs. D advised that Jason has performed very well at the school, noting that during the first six months of attendance at the private school, he gained approximately one year in every subject.

With the knowledge of the termination of VRS funding effective September, 1985, Mrs. D approached the local Board of Education in March, 1985 intending to register Jason with the Board for the upcoming school year. On June 21, 1985, Mrs. D met with Board officials to discuss the proposed program it intended to provide for her son.

By letter dated June 21, 1985, to Mrs. D, Mr. E, Special Education Consultant of the local Board of Education, outlined the educational plan the Board would offer for her son as a result of their meeting.

By letter dated August 23, 1985, Mr. and Mrs. D advised that, on the basis of the limited information disclosed to them about the program, they believed they had no option but to keep their son at the private school for the 1985/86 school year and apply to the Review Committee for VRS/LD Placements for transitional funding.

On behalf of Jason, Mr. and Mrs. D applied to the Review Committee for VRS/LD Placements requesting the continuation of funding for placement at the private school for the 1985-86 school year and until the local Board of Education proposed an appropriate program to meet Jason's academic needs.

On December 13, 1985, Mr. and Mrs. D and a representative from the private school attended the Review Committee meeting. Following the review, the Committee submitted a placement recommendation to the Minister of Education and recommended that no funding be provided for Jason's education at the private school for the school year 1985/86. The

Committee concluded that the local Board of Education offered Jason an appropriate program for the 1985/86 school year. The Minister accepted the Committee's recommendation and advised Mr. and Mrs. D of his decision by letter dated January 6, 1986.

Firstly, Mr. and Mrs. D complained to my Office that the placement decision was unreasonable as it was based on imprecise and vague descriptions of the program offered by the local Board. They contended that, in the absence of a detailed and precise description of the proposed program, the Minister should have rejected the program and ordered the continuation of private school funding for this school year and until the Board proposed a detailed working program to meet Jason's needs. Mr. and Mrs. D's final contention, which I shall deal with in conjunction with the first, was that the Minister's reliance upon the Review Committee's recommendation was unreasonable because the Committee did not determine if the proposed program offered by the local was appropriate to meet Jason's needs.

Upon completion of our review of these issues in August, 1986, I notified the Minister of Education and the Chairperson of the Review Committee of my tentative conclusions and recommendations. These conclusions were that in the absence of a more detailed description of the individual pupil program, the recommendation of the Review Committee that Jason D's placement be with the local Board of Education may have been unreasonable; and that the decision of the Minister to accept the Committee's recommendation in the absence of a more detailed description of the individual pupil program may have been unreasonable. It was my tentative recommendation that the Minister alter his decision and direct that the Ministry of Community and Social Services provide Jason D with the transitional funding to cover his 1985-86 fees at the private school.

In noting their dissatisfaction with the Review Committee's recommendation and the Minister's decision, Mr. and Mrs. D recognized that the Review Committee expected them to provide it with information on what was being offered by the Board. However, as Mr. and Mrs. D were not provided with information by the Board about its proposed program for Jason, they were unable to provide this information to the Review Committee and have a full and fair review. They believed it was incumbent on the Committee to obtain a specific program description of the placement offered by the Board prior to making its recommendation to the Minister. In the absence of such information, Mr. and Mrs. D contended that the Review Committee could not make a reasonable determination with respect to the appropriateness of the Board placement.

With respect to Jason's placement at the local Board of Education, the following documents were contained in the Review Committee's file:

1. A letter from Mr. E, Special Education Consultant with the local Board of Education, dated June 21, 1985. He advised that initially Jason would require support provided by an intermediate learning

disability placement and that the program would focus on his written language needs, his difficulty in mathematics as well as his auditory and visual skills/needs. Mr. E advised that this process would mean enrolment for Jason at a public school, if the class was located there; a special education teacher would draw up a program plan in consultation with the school's diagnostic and resource teacher, and a psychologist and/or speech and language pathologist as required. He stated that the plan should be completed by October and updated on the basis of close monitoring and evaluation. Mr. E stated that the plan would also deal with Jason's needs in the integrated setting as well as in the program to be delivered in the learning disability class.

2. A student profile of Jason D which was initiated on June 2, 1985. The profile provided information about Jason's school history, assessments (psychological, speech and language etc.).

3. A letter from Mr. E dated September 23, 1985. Mr. E stated that he regretted Mrs. D's decision to withdraw her son from the public school system. Mr. E explained that after an absence of three years from the public school system, they did not know Jason well enough to provide specifics. He went on to say that programming decisions are the responsibility of the classroom teacher under the principal's supervision.

In addition to the above, Dr. Hardy advised my investigator that on December 11, 1985, the Executive Assistant for the Review Committee contacted Mr. E at the Board to confirm that a space was available at the public school and that five students would be enrolled. Then, on December 13, 1985, Dr. Hardy contacted Mr. E to obtain some particulars about the placement offered. Mr. E advised Dr. Hardy that there were five pupils then enrolled in the program and that the maximum enrolment was eight. Further, a teacher with a good language background would be hired, and the placement was a self-contained class with integration available and preparation for secondary school enrolment to either Thornhill (which was a withdrawal program) or Thornlea (half-day core program - half-day withdrawal program).

Dr. Hardy stated her belief that the Committee had sufficient information before it concerning the Board's placement offer to make a recommendation. Additionally, she advised that the Committee did not inquire into the program details such as teaching methods and strategies, teacher qualifications, etc., as this was the responsibility of the Board and the teacher involved, and was not part of the Committee's terms of reference.

Mrs. D advised my Office that during her Review Committee meeting, she orally informed the Committee, at its request, of her son's past experience with the local Board of Education. Mrs. D advised the Committee that her son had been placed in a class for the learning disabled within the public system for three years. During that time

Mrs. D claimed that the Board was unable to properly understand her son's disability or to program for his needs. Consequently, Jason began to regress until January, 1984, when he was placed in a private school and funded under the Vocational Rehabilitation Services Act. Mrs. D believes that in view of the history of problems experienced with the Board, of which the Committee was aware, it was essential for the Committee to request enough information from the Board to make an informed and knowledgeable recommendation as to the appropriateness of the Board's placement offer. Mr. and Mrs. D complained that the Committee's placement recommendation was based on an imprecise and vague description of the Board's program, and on this basis, the Minister ought not to have accepted it.

I note that the Committee's terms of reference gave it the mandate, in part, to identify the needs of the pupil and recommend appropriate placement for the pupil for the 1985/86 school year. In the course of accepting the placement offer made by the Board as "appropriate", the Committee did not consider as part of its responsibility the obtaining of program details from the Board. It is my understanding that its inquiries focused only on such general issues as the availability of a placement, the physical location, the size of the class, and future integration.

In the course of our investigation, I learned that the amount of placement information provided to parents by Boards of Education has varied. Some Boards have taken the position that parents can be provided with basic information about placement such as location, class size, teacher qualifications if the teacher has been hired, and in some instances, the availability of professional support staff, prior to the student attending class. But, as the details about the individual pupil plan are developed by the teacher after the student is in the classroom, this information is not made available before the commencement of the school year, that is, not until the student has been in the classroom for a period of time.

I was made aware of cases (one of which involved a transfer of a student from a private school setting to the public system in September 1985) where the board officials actually provided the parents with written descriptions of the proposed programs. In one particular case, a special education consultant outlined, in writing, the program details pertaining to the teaching strategies, methods and services (equipment) to be used. I understand however that these cases are considered to be unique in that boards are reluctant to discuss program details until after the student has been placed. Notwithstanding this, the fact that board officials in these cases have provided program details indicates to me that the provision of such information to parents and, in turn, to the Review Committee, prior to the student's attendance in the classroom, may well have been possible and was, in my view, necessary for a proper determination of an appropriate placement.

I note from Mr. E's letter of September, 1985 his statement that program details were not available since Jason had been absent from

the public school system for three years. It appears he was in error. Jason left the local Board in January, 1984 and the following year his mother approached the Board for the purposes of registering him. It also appears from the student profile mentioned earlier that the Board may have had psychological and speech and language assessments to which it could have referred in the course of setting up a program proposal.

As well, keeping in mind the unfavourable past experience Mrs. D had encountered with respect to her son's academic progress in the public school system, and his present academic success in the private school setting, it is understandable that she would not accept the Board's offer in the absence of information about the manner in which it intended to deal with her son's learning and language impairments.

I advised the Minister and the Chairperson that while I am not questioning the new direction in which the Education Amendment Act is leading education in Ontario, I believe that the Review Committee may have construed its mandate too narrowly. I understand that the Minister of Education established the Review Committee in August, 1985 out of a concern that learning disabled pupils still in a private setting in 1984/85 be properly placed for the 1985/86 academic year. The Committee, while acting as an advisory body to the Minister, was entrusted with the responsibility to review and recommend appropriate placement for the transitional year 1985/86. It would appear that the Review Committee ought to have had before it sufficient program information about the Board placement, and not merely accepted that a placement existed, in order to satisfactorily fulfill its duty to recommend a placement that is appropriate.

On October 17, 1986 I received a response from the Minister of Education concerning these issues. In the Minister's opinion, the recommendations of the Review Committee reflected a careful and knowledgeable assessment of Jason's needs. He was satisfied that the Committee "had sufficient information regarding the programs offered both by the private school and by the school board to make an unqualified professional and objective recommendation." The Minister also stated "(i)t is my conviction that, in accordance with paragraphs 63 and 64 of subsection 1(1) of the Education Act and clause 2(3)(d) of Ontario Regulation 554/81, the Board has provided adequate information upon which a placement decision can be made."

In reviewing the Minister's representations and the relevant legislation, I have noted that section 8(2) of the Education Act requires the Minister to "ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services ...." Special education program is defined in section 1(1) paragraph 63 as "in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional

pupil;" also, I have noted that since, for the purposes of clause 2(3)(d) of Ontario Regulation 554/81, the "committee" referred to means a Special Education Identification, Placement and Review Committee established under this regulation, I have not considered it to be relevant to this investigation.

Having carefully considered the Minister's position, it is my view that the recommendation of the Review Committee and the decision of the Minister to accept their recommendation, that Jason D be placed in the local Board of Education, in the absence of a more detailed description of the educational program, were unreasonable. In the absence of such a description the Minister ought to have granted Jason continued funding for his education at the private school.

After considering all of the information gathered during the course of our investigation into Mr. and Mrs. D's complaints, I have determined pursuant to section 22(1)(b) of the Ombudsman Act that:

1. The recommendation of the Review Committee that Jason D be placed with the local Board of Education, in the absence of a more detailed description of the individual pupil program, was unreasonable.

2. Further, the decision of the Minister to accept the Committee's recommendation, in the absence of a more detailed description of the individual pupil program offered by the Board, was unreasonable.

It is my recommendation pursuant to section 22(3)(g) of the Ombudsman Act that:

> The Minister alter his decision and direct that the Ministry of Community and Social Services provide Jason D with transitional funding to cover his 1985/86 fees at the private school.

My final conclusions and recommendation were reported to the Minister on December 1, 1986. On January 14, 1987, several of my senior staff met with representatives of the Ministry to discuss this and other cases. On February 6, 1987 I received a written response to my report. The Deputy Minister stated that he remained of the view that the Review Committee, as well as the school board, acted within the parameters of the Education Act; further, the information on the special education program provided by the School Board was adequate and appropriate. In his opinion "to expect a school board to provide a detailed individual plan for a pupil, with whom the special education teacher has had no contact, is unrealistic and contrary to the intent of the legislation."

Further, the Deputy Minister noted that while Mr. and Mrs. D did not accept the placement offered by the Board, correspondence on file indicates that they did not avail themselves of their right to an IPRC determination, nor did they seek clarification of the "legal requirements of the board." It was the Deputy Minister's position that although Mr.

and Mrs. D expressed dissatisfaction in their past relationship with the Board, this does not alter the fact that the Board expressed its willingness to provide a special education program which it believed would be appropriate for Jason. It was the professional opinion of the Board and the expert members of the Review Committee that the Board could have offered an appropriate special education program for the school year, 1985-86.

In considering the Ministry's position it is interesting to note that at the time of Mr. and Mrs. D's consultations with the school board in June 1985, neither the school's location nor the special education teacher had been determined. In considering Mr. and Mrs. D's "right" to an IPRC determination, it should be kept in mind that a student must be enrolled within the public school system before an IPRC can be convened. Further, an IPRC may be held at the request of a parent or the Board; there is no indication on file that the Board offered or suggested that an IPRC be held, for example, by enrolling Jason in a summer school program so that further program information could be available for a September 1985 placement.

Although the Deputy Minister noted that the Board expressed a willingness to provide a special education program, it has been Mr. and Mrs. D's contention that no evidence was revealed about this program in order to determine its appropriateness for their son. Again, the Ministry has expressed that it was the professional opinions of the Board and the expert members of the Review Committee that the Board could have offered an appropriate program; however, the basis for these professional opinions has not been offered or explained in any of the Ministry's correspondence with us. Instead, availability of a program but not its appropriateness to the child has only been discussed.

I was not persuaded by the representations made by the Deputy Minister and, pursuant to the discretion given to me under section 22(4) and (5) of the Ombudsman Act, I referred the matter to the Premier on February 20, 1987. Mr. and Mrs. D were also advised of the results of the investigation at that time.

DETAILED SUMMARY NO. 8

Mr. and Mrs. KK first contacted my Office in a letter dated March 5, 1986 to register a complaint against the recommendation of the Review Committee for VRS/LD Placements and the subsequent decision of the Minister of Education to place their son, Brian, with the local Board of Education for the 1985-86 school year.

On March 24, 1986, the Honourable Sean Conway, Minister of Education and Dr. Madeline Hardy, Chairperson of the Review Committee for VRS/LD Placements, were advised of my intention to investigate the KK's concerns. We advised that Mr. and Mrs. KK were of the view that the Committee's recommendation was unreasonable as it did not have any information regarding the existence of an appropriate program within the Board on which to render its recommendation. The complainants contended that the Board was unable to offer an appropriate program in the previous academic year and that no information regarding the existence of an appropriate program for the 1985-86 academic year was received or reviewed by the Committee in rendering its decision.

Mr. and Mrs. KK further contended that the Committee was unreasonable in failing to determine upon investigation, that an appropriate program was available in the Board. They believed that it was unreasonable of the Committee to rely heavily upon its members' experience with school board programs rather than actually investigating and identifying an appropriate program. It was Mr. and Mrs. KK's view that the School Board was unable to provide an individualized program or language therapy as stated by the School Board and by Dr. Hardy of the Review Committee.

We invited the Chairperson and the Minister to provide my Office with any comments they wished to make on these contentions.

On May 7, 1986, we received a response from the Honourable Sean Conway, Minister of Education, in response to the letters sent both to him and to Dr. Hardy. A copy of this letter was sent to Mr. and Mrs. KK on May 21, 1986 and they were invited to provide us with their comments. On June 2, 1986, we received written comments on the Minister's letter from Mrs. KK.

In the course of our investigation, a member of my investigative staff, met with Mr. Peter Wiseman, Acting Director of the Special Education Branch and Mr. Don Werner, Special Education Officer, both from the Ministry of Education; Dr. Madeline Hardy, Chairperson of the Review Committee for VRS/LD Placements and the Executive Assistant to the Committee. In addition, my investigator contacted Dr. Hardy by telephone and spoke with Mrs. KK on several occasions. A copy of Mr. and Mrs. KK's file at the Review Committee's office was also obtained.

As well, my investigator informally contacted Mr. A, Superintendent of Special Services and Schools with the local Board of Education.

Our investigation has revealed the following:

Brian KK has been identified as having a significant receptive language and language processing learning disability which causes difficulties in understanding a meaningful sequence of words and instructions, particularly if they are presented orally. It has also been suggested that he may have a mild attentional deficit disorder.

In 1984-85, Brian attended Private School B which we understand is a private school for children with learning disabilities. In 1985-86, for financial reasons, Brian's parents transferred him to Private School D (which is affiliated with Private School B and actually located in the same building).

With the knowledge of the termination of Vocational Rehabilitation Services (VRS) funding effective September, 1985, Mrs. KK approached the local Board of Education in February 1985 intending to register her son with the Board for the upcoming school year. Mrs. KK requested an Identification Placement Review Committee (IPRC) meeting, but her request was denied because her son was not legally registered with the Board. In order to fulfill the legislative requirements, Mrs. KK placed her son in school in June, 1985. On June 19, 1985, an IPRC was held and Brian was identified as an exceptional pupil and recommended for placement in a primary learning disability class at Public School E.

On June 20, 1985, Mrs. KK visited the school and met with the principal and classroom teacher in order to obtain more specific information about the language program which the teacher intended to use for Brian; however, Mrs. KK has advised that she found that no individual program had been developed for her son.

By letter dated July 5, 1985, Mrs. KK notified the School Board that she would not accept the placement offered to her. She subsequently applied to the Review Committee for VRS/LD Placements for a review of her child's placement because the School Board failed to provide her with adequate information and documentation so that she could assess the appropriateness of the program. Mrs. KK stated in her application to the Review Committee that she had been unable to obtain even a general outline of the program the school intended to provide for Brian until the School Board prepared its statement of the proposed placement for the Review Committee meeting.

On January 31, 1986, a Review Committee meeting was held. Following the review, the Committee submitted a placement recommendation to the Minister of Education, and recommended that no funding be provided for Brian's education at Private School D for the school year 1985-86.

The Committee concluded that the local Board of Education offered Brian an appropriate program for the 1985-86 school year. The Minister accepted the Committee's recommendation and advised Mr. and Mrs. KK of his decision by letter dated May 5, 1986.

Mr. and Mrs. KK complained that the placement decision was unreasonable as the Board was unable to offer an appropriate placement in the previous academic year and there was no information regarding the existence of an appropriate program for 1985-86 within the Board on which to render a decision. They further contended that it was unreasonable of the Committee not to have investigated to determine that an appropriate program was available. They believed that the Minister, in accepting the unsubstantiated recommendations of the Committee, had failed in his mandate to ensure that an appropriate program was available to meet Brian's needs.

Upon completion of our review of these issues in early March, 1987, I notified the Minister of Education and the Chairperson of the Review Committee of my tentative conclusions and recommendation. My tentative conclusions were that in the absence of a more detailed description of the program, the recommendation of the Review Committee that Brian KK's placement be with the local Board of Education may have been unreasonable; and that the decision of the Minister to accept the Committee's recommendation in the absence of a more detailed description of the program, may have been unreasonable. It was my tentative recommendation that the Minister alter his decision and direct the Ministry of Community and Social Services to provide Brian KK with the transitional funding to cover his 1985-86 fees at Private School D.

With respect to Brian's proposed placement with the local Board of Education, the Review Committee reviewed a report prepared by the School Board. The report indicated that a primary learning disability class placement, staffed by a special education teacher, was available at Public School E. The maximum number of students enrolled in the class was eight and the services of the special education team, consisting of the principal, a psychology staff member, a speech and language pathologist, a social worker and a child care worker, were available. The report indicated that individualized programs are designed to meet the specific needs and strengths of each pupil in the area of language development, mathematics and social skills. The program emphasized the development of receptive and expressive language and might include some or all of the following: organics, patterned writing, language experience, theme-related activities, SRA reading series, specific skill series, individualized spelling, fluency reading and writing and phonetic programs. The report also indicated that integration to age-appropriate grade levels was available depending on the student's ability to cope with the regular classroom program. With respect to a specific program for Brian, it was stated in the report that the school board intended to "plan an individual program plan for Brian" based on the private school reports, outside assessments which were to be provided by his parents, the school's own assessments which would have been done upon Brian's

return to the public system, and Brian's identified needs as outlined at the case conferences held in February and June, 1985. However, failing his return to the school system in September 1985, it was not possible to be any more specific than the general description provided.

A Report of IPRC dated June 19, 1985, was also considered by the Review Committee for VRS/LD Placements. In it the IPRC identified Brian as an exceptional student and recommended placement in a primary learning disability class at Public School E in September, 1985. Further, the IPRC recommended that a speech and language pathologist assist with the classroom program and that an educational assessment be completed by the developmental and special education teacher.

This was the only written information before the Review Committee with respect to the proposed School Board placement.

In addition to the above, Dr. Hardy advised my investigator that the Review Committee was of the opinion that there was sufficient information available about the School Board placement to justify the Committee's recommendation to place Brian at Public School E. Dr. Hardy reviewed with my investigator the particulars in the Board's statement outlined above, and stated her belief that a school board is only required to identify the placement and does not have to provide any details of the individual pupil program or plan.

Mr. A advised my investigator that the School Board could have been a little more specific about the details of Brian's individual program plan. However, they were hesitant about preparing a plan until they had a chance to observe Brian and assess the significant academic progress he had apparently made during the year he attended Private School B. With respect to the language program available, Mr. A advised that more specific information about the program to be used also could have been provided to Mrs. KK, although he understood that she wanted the School Board to use the Distar Programme, used by the private school, Private School D. Mrs. KK responded that she requested the School Board to continue with the Distar reading program because her son had had such success with it.

I noted that the Committee's terms of reference gave it the mandate, in part, to identify the needs of the pupil and recommend appropriate placement for the pupil for the 1985-86 school year. In the course of accepting the placement offer made by the Board as "appropriate", the Committee did not consider it part of its responsibility to obtain a program description from the Board. Its inquiries focused only on such general items as the availability of a placement, the physical location, the size of the class, and future integration. I noted that in Brian KK's particular case, the Review Committee did not contact the School Board to request additional information.

In the course of our investigation, I learned that the amount of placement information provided to parents by boards of education has

varied. Generally, boards have taken the position that parents can be provided with basic information about placements such as location, class size, teacher qualifications if the teacher has been hired, and, in some instances, the availability of professional support staff, prior to the student attending class. But, since the description of the individual program is developed by the teacher after the student is in the classroom, this information is not available before the commencement of the school year, that is, not until the student has been in the classroom for a period of time.

I was made aware of one case, however, (involving the transfer of a student from a private school setting to the public system in September, 1985) in which board officials actually provided the parent with a written description of a proposed program. In this case, a special education consultant outlined in writing the program details pertaining to the teaching strategies, methods and services (equipment) to be used. I understand, however, that the above case is considered to be unique and that boards are generally reluctant to discuss program details until after the student has been placed. Notwithstanding this, the fact that board officials in this "unique" case have provided program details indicates to me that the provision of such information to parents and, in turn, to the Review Committee, prior to the student's attendance in the classroom, may have been possible and was necessary for a fair review.

I noted that the School Board's submission to the Review Committee respecting the placement it offered Brian contained only a general description of the program offered by the Board. The School Board intended to develop an individual pupil program based on the private school's reports, outside assessments, and the assessments completed by the local school upon Brian's return. However, since Brian did not return to the school system in September 1985, the School Board advised that specific program information was not available.

I noted that Brian returned to the local Board of Education for one and a half weeks at the end of June 1985. Further, he had an IPRC meeting in June 1985 and his mother subsequently met with the principal and classroom teacher. It appeared that the School Board did have psychological and other assessments to which it could have referred in the course of developing a program proposal. In view of the above, it appeared that a more detailed program description would have been available from the local Board of Education.

I advised the Minister and the Chairperson that while I am not questioning the new direction in which the Education Amendment Act is leading education in Ontario, I believe that the Review Committee may have construed its mandate too narrowly. I understand that the Minister established the Review Committee in August of 1985 out of a concern that learning disabled pupils still in a private setting in 1984/85 were properly placed in the 1985/86 academic year. The Committee, while acting as an advisory body to the Minister, was entrusted with the responsibility to review and recommend appropriate placement for the

transitional year 1985/86. In the absence of a more detailed description of the program offered by the local Board of Education, it does not appear that the Review Committee was in a position to recommend that the School Board placement was appropriate and that funding should be denied. Neither does it appear that the Minister was in a satisfactory position to deny Mr. and Mrs. KK's application for funding.

At this time, I have not received a response from the Minister of Education or the Chairperson of the Review Committee. I am nevertheless proceeding to finalize my report containing my view that the recommendation of the Review Committee and the decision of the Minister to accept the recommendation that Brian KK be placed in the local Board of Education, in the absence of a more detailed description of the program, were unreasonable. In the absence of such a description, the Minister ought to have granted Brian continued funding for his education at Private School D. I will, of course, give consideration to any further comments either the Minister or the Chairperson wish to provide.

Therefore, after considering all of the information gathered during the course of our investigation into Mr. and Mrs. KK's complaints, I have determined pursuant to section 22(1)(b) of the Ombudsman Act that:

1. The recommendation of the Review Committee that Brian KK be placed with the local Board of Education, in the absence of a more detailed description of the program, was unreasonable.

2. Further, the decision of the Minister to accept the Committee's recommendation, in the absence of a more detailed description of the program offered by the Board, was unreasonable.

It is my recommendation pursuant to section 22(3)(g) of the Ombudsman Act that:

> The Minister should alter his decision and direct the Ministry of Community and Social Services to provide Brian KK with transitional funding to cover his 1985-86 fees at Private School D.

This report was sent to the Minister of Education on March 13, 1987. To date I have not as yet received a response from the Minister. Because the end of my reporting period was approaching, a copy of this report was forwarded to the Premier on March 25, 1987. Mr. and Mrs. KK were notified of the results of my investigation and the file was then closed.

DETAILED SUMMARY NO. 9

In a letter dated June 17, 1986, Mr. and Mrs. LL's M.P.P. contacted my Office on their behalf to register a complaint against the recommendation of the Review Committee for VRS/LD Placements and the subsequent decision of the Minister of Education to place Mr. and Mrs. LL's son, Ethan, with the local Board of Education.

On June 26, 1986, the Honourable Sean Conway, Minister of Education and Dr. Madeline Hardy, Chairperson of the Review Committee for VRS/LD Placements were advised of my intention to investigate Mr. and Mrs. LL's concerns. We advised that Mr. and Mrs. LL were of the view that the Committee's recommendation was unreasonable as an appropriate program within the Board had not been identified or described. Mr. and Mrs. LL contended that it was unreasonable of the Committee not to inform them in writing of its recommendations and further, unreasonable of the Minister not to have provided them with reasons for his decision.

Mr. and Mrs. LL further contended that the placement at Public School A is unable to offer adequate supervision and lacks a suitable occupational therapy and speech therapy component to meet Ethan's special needs, and that the absence of these components would be detrimental to Ethan's academic progress. Mr. and Mrs. LL's final contention was that Ethan's attendance was dependent on medical attention and medication and no one at Public School A is able to administer medication and to provide treatment when required.

We invited the Chairperson and the Minister to provide my Office with any comments they wished to make on these contentions.

On August 8, 1986, we received a letter from the Honourable Sean Conway, Minister of Education, in response to the letters sent to both Mr. Conway and Dr. Hardy. A copy of this letter was sent to Mr. and Mrs. LL on August 18, 1986 and they were invited to provide us with their comments. On October 22, 1986, we received written comments on the Minister's letter from Mrs. LL.

In the course of our investigation, a member of my investigative staff met with Mr. Peter Wiseman, Acting Director of the Special Education Branch and Mr. Don Werner, Special Education Officer, both from the Ministry of Education. My investigator also contacted Mr. Jack Taylor, Education Officer, Ministry of Education, and Dr. Madeline Hardy, Chairperson of the Review Committee for VRS/LD Placements. In addition, Mr. D, School Superintendent, Special Education and Mr. C, Superintendent - Curriculum, Special Education, both with the local Board of Education, were contacted.

Our investigation has revealed the following:

At the time of the Review Committee meeting, Ethan LL was seven years old. In 1984/85 he attended a private school. The documentary information before the Review Committee indicated that Ethan has an average intelligence, a moderate delay in articulation, and a great deal of difficulty with receptive and expressive language, his gross motor and fine motor skills, and peer interactions. In May 1984, he was recommended for speech therapy and an occupational assessment. The latter assessment suggested a possible dysfunction in the vestibular proprioceptive and tactile areas, meaning that Ethan could experience poor motor planning, distractibility, and have an adverse reaction to being touched. Also, Ethan was considered to have a major behavioural problem and was considered hard to manage. In June 1984, he required neurosurgery for a hypothalamic haematoma. Following the operation he developed anterior and posterior pituitary deficiency for which he must take regular medication.

Mrs. LL first contacted the local Board of Education on January 4, 1985 to advise that she wanted to register Ethan with the Board. In March and April, Mrs. LL contacted the Board to inquire about the placements it had available for Ethan. She was advised by Mr. D, School Superintendent, Special Education, that the availability of a placement for her son would be determined close to the end of the 1984/85 school year.

On May 6, 1985, Mrs. LL received a letter from Mr. D advising that her case had been referred to Mr. B, Coordinator of Special Education, who would be responsible for Ethan's placement in September, 1985. Mr. B in turn referred Mrs. LL to a Mrs. E, Special Education Consultant, who was responsible for finding a suitable placement for Ethan. In late May 1985, Mr. and Mrs. LL and Mrs. E met at a public school to observe the special education class and speak to the classroom teacher. During that meeting it came to Mr. and Mrs. LL's attention that Mrs. E did not know anything about Ethan because she did not have any information respecting his school history or his special needs. Mr. and Mrs. LL were extremely upset with the consultant's lack of familiarity with their son's needs given that she was in charge of his case and, accordingly, they contacted a School Trustee in their ward.

The School Trustee communicated Mr. and Mrs. LL's concerns to the School Board and a second placement at Public School A was offered to them. A meeting to be attended by Mr. B who was familiar with their son's case and Mrs. E at Public School A was arranged; however, when Mr. and Mrs. LL arrived at the school, they were advised that Mr. B would not be attending. Mrs. E was present although she was not aware that Mr. B was even expected. Mr. and Mrs. LL were upset but nevertheless agreed to remain at the school to observe the special education class and speak with the classroom teacher. Mrs. LL stated that there was no in-depth discussion about her son's needs (e.g. academic, medical, speech/language, occupational, and supervisory needs) or about what the School Board could offer.

Mr. and Mrs. LL also attended a subsequent meeting with officials from the local Board and staff from the private school; however, Mrs. LL advised that although there was some discussion of Ethan's needs, again the School Board did not outline what it would do for Ethan. Mr. and Mrs. LL decided to keep Ethan at the private school for the 1985/86 school year and apply to the Review Committee for VRS/LD Placements for transitional funding.

In a letter dated September 1, 1985, Mr. and Mrs. LL wrote to Mr. Sean Conway, and outlined their experience with the School Board as noted above. This resulted in a subsequent meeting on October 10, 1985 with Mr. Taylor, Education Officer, Ministry of Education, and Mr. C from the local Board. Mrs. LL claimed that at this meeting, Mr. C advised her that there were no placements available for Ethan in the local Board for 1985/86 and accordingly, they would be discussing Ethan's placement in 1986/87.

In the meantime, on September 9, 1985, Mr. and Mrs. LL applied to the Review Committee for VRS/LD Placements for the transitional funding to cover their son's 1985/86 educational costs at the private school. Following the review, the Committee submitted a placement recommendation to the Minister of Education and recommended that no funding be provided for Ethan's education at the private school. By letter dated November 18, 1985, the Minister of Education advised Mr. and Mrs. LL that he had accepted the Review Committee's recommendation that an appropriate placement could be provided by the local Board of Education for the 1985-86 school year and that no funding would be forthcoming for Ethan's placement at the private school.

Mr. and Mrs. LL's first contention was that an appropriate placement within the Board had not been identified or described. Our investigation revealed that the Review Committee file contained a letter from the School Superintendent, Mr. D, which indicated that Ethan was recommended for placement in a special education (learning disabilities), self-contained class at Public School A for September 1985. Further, on admission to this program, Ethan's specific educational needs would be reviewed and an educational plan prepared and shared with Mr. and Mrs. LL.

No other information respecting the placement offered by he local Board was available to the Review Committee.

Our investigation also revealed that, in addition to recommending that no funding be provided for Ethan's education at the private school, the Review Committee recommended on the placement recommendation form to the Minister, the local Board of Education be requested to identify classes in the area which would best meet Ethan's needs and invite the parents to visit the classes so that they might assess them in terms of their own educational requirements for Ethan. No reference or recommendation was made with respect to Public School A.

Dr. Hardy advised my investigator that one of the major problems with this case was that Mr. and Mrs. LL were extremely angry

with the local Board because it had not dealt with them in an above-board manner. Dr. Hardy stated that she believed Mr. and Mrs. LL's sentiment was justified and went on to say that the School Board had "lost contact" with them. Dr. Hardy advised that in arriving at its recommendation to the Minister, the Review Committee did not have the placement at Public School A in mind as the Committee did not know much about it; rather, the Committee was counting on the local Board to reexamine Ethan's case and search the local area boards to find an appropriate placement for Ethan. Dr. Hardy understood that the local Board shared one budget and a wealth of services with approximately seven other large school boards. In view of this, Dr. Hardy appeared confident that something would be found for Ethan. Mr. J. Taylor, Education Officer and Liaison Officer for the local Board of Education, advised my Office that although the local Board is affiliated with six other public school boards under the Metropolitan Toronto School Board, it operates independently with a few exceptions, namely its budget and programming for the trainable retarded, the blind and visually impaired, and the deaf and physically handicapped. With respect to learning disabled pupils, each board is responsible for its own services as there is no area-wide program.

Dr. Hardy further advised my Office, in connection with another recommendation made by the Review Committee to the Minister, that she contacted an official from the local Board and suggested that the Board assign one professional, who had had no previous involvement with this case, to work with Mr. and Mrs. LL to find a suitable placement. Further, the Board should identify the available classes in the area which would best meet Ethan's needs and attend these classes with the parents. Dr. Hardy advised that the local Board was, of course, under no obligation to follow through with the Review Committee's suggestions and that it was the Ministry's responsibility to ensure that Review Committee applicants were properly placed by their school boards. I understand that a copy of the Minister's decision respecting Ethan's placement was sent to the School Board; however, it does not appear that any follow-up was conducted by Ministry officials. I understand too that although Mr. and Mrs. LL did get in touch with the School Board with respect to the Review Committee's recommendations they were only offered a placement at Public School A.

I noted that the Committee's mandate was, in part, to identify the needs of the pupil and to recommend an appropriate placement. In the course of accepting the placement offer made by a board as appropriate, the Committee would contact a board to confirm that the placement it offered was available. I noted that the Committee was aware that the local Board had submitted a statement which indicated a placement was available for Ethan. The Committee did not have this placement offer in mind when it formulated its recommendations and did not identify or confirm that a specific placement for Ethan for 1985/86 existed. Rather, the Committee recommended that the local Board, together with the parents, search for an appropriate placement. In considering these facts, it did not appear to me that the Review Committee fulfilled its duty to recommend an appropriate placement to the Minister of Education

as such a placement was not identified. Further, it was my view that in the absence of this information, the Minister was not in a satisfactory position to deny Mr. and Mrs. LL's application for funding.

On March 5, 1987, I wrote to the Honourable Sean Conway, Minister of Education, and Dr. Madeline Hardy, Chairperson of the Review Committee, to notify them of my tentative conclusions and recommendation with respect to Mr. and Mrs. LL's first contention. My conclusions were that the recommendation of the Review Committee that funding be denied on the basis that an appropriate placement for Ethan LL for 1985-86 could be provided by the local Board of Education was unreasonable, and that the decision of the Minister to accept the Committee's recommendation without identifying an appropriate placement or obtaining a description of the program offered by the Board was unreasonable. It was my tentative recommendation that the Minister should alter his decision and direct that the Minister of Community and Social Services provide Ethan LL with transitional funding to cover his 1985-86 fees at the private school. At this time, I have not yet received a response from the Minister or the Chairperson. Notwithstanding this, it is my view that the recommendation of the Review Committee and the decision of the Minister to accept its recommendation that Ethan LL be placed in the local Board of Education, without identifying an appropriate placement or obtaining a description of the program offered by the Board, was unreasonable. In the absence of an existing placement and appropriate program description, I believe that the Minister ought to have granted Ethan continued funding for his education at the private school.

Mr. and Mrs. LL's second contention, as noted earlier in this report, was that it was unreasonable of the Committee not to inform them in writing of its recommendations and, further, unreasonable of the Minister not to provide them with reasons for his decisions.

In considering the above matters, I do not believe that it would have been appropriate for the Committee to inform Mr. and Mrs. LL in writing of its recommendations since it was an advisory body and the Minister made the final decision. The concern over the lack of explanation for the Minister's decision was also raised by other parents who have brought similar complaints to my attention against the Ministry of Education and the Review Committee for VRS/LD Placements. Upon completion of our review of this issue, in July, 1986, I notified the Minister of Education of my tentative conclusion that it was unreasonable for him not to provide the parents with reasons for his decisions.

I advised the Minister that, although he was under no legal obligation to apprise the parents of the reasons for his decision, it was my view that it was unreasonable of him not to do so. I stated my belief that wherever possible, individuals ought to be provided with clear reasons behind the decisions their government makes and I found no reason to view these circumstances as exceptional. I understand that the Minister has accepted this conclusion and has agreed to consider it for possible inclusion in the mandate of future committees.

Mr. and Mrs. LL's third and fourth contentions, also noted earlier in this report, were about the Public School A placement. As the Review Committee did not appear to consider this placement offer by the Board in the course of its review of Ethan LL's application, the concerns of Mr. and Mrs. LL about the details of the placement were not examined in the course of this investigation. Therefore I have not made any conclusions with respect to this issue.

After considering all of the information gathered during the course of our investigation into Mr. and Mrs. LL's complaints, I have determined pursuant to section 22(1)(b) of the Ombudsman Act that:

1. The recommendation of the Review Committee that funding be denied on the basis that an appropriate placement for Ethan LL for 1985/86 could be provided by the local Board of Education, was unreasonable.

2. Further, the decision of the Minister to accept the Committee's recommendation without identifying an appropriate placement or a description of the program offered by the Board was unreasonable.

It is my recommendation pursuant to section 22(3)(g) of the Ombudsman Act that:

> The Minister should alter his decision and direct that the Ministry of Community and Social Services provide Ethan LL with transitional funding to cover his 1985/86 fees at the private school.

With respect to Mr. and Mrs. LL's second contention about the Review Committee's failure to inform them in writing of its recommendations, the Ombudsman Act permits me to find a complaint to be supported and make an appropriate recommendation where I am of the view that the decision, act or omission complained of was "unreasonable, unjust, oppressive, or improperly discriminatory". Having carefully examined this particular issue, I am unable to so describe the actions of the Review Committee.

This report was sent to the Minister of Education on March 13, 1987. To date I have not as yet received a response from the Minister. Because the end of my reporting period was approaching, a copy of this report was forwarded to the Premier on March 25, 1987. Mr. and Mrs. LL were notified of the results of my investigation and the file was then closed.

DETAILED SUMMARY NO. 10

By letter dated November 25, 1985, Mrs. R wrote to me to register a complaint against the recommendation of the Review Committee for VRS/LD Placements and the subsequent decision of the Minister of Education and the Minister of Community and Social Services to place her son at the Trillium School in Milton, Ontario instead of continuing funding for an additional year at his existing placement in a private school.

By letters dated December 9, 1985, Dr. Madeline Hardy, Chairperson, Review Committee for VRS/LD Placements, the Honourable Sean Conway, Minister of Education and the Honourable John Sweeney, Minister of Community and Social Services, were advised of the Ombudsman's intention to investigate Mrs. R's complaints. We advised that Mrs. R was of the view that the decision was unreasonable as the psychological assessments submitted to the Review Committee indicated that her son required the highly structured and specific environment provided at the private school and that a change in placement would be detrimental to his educational progress. Other contentions were made by Mrs. R which I did not support and, for the purposes of this Report, they are omitted.

We invited the Chairperson and the Ministers to provide our Office with any comments they wished to make on these contentions.

On January 23, 1986, we received a response from Mr. A.F. Daniels, Assistant Deputy Minister, on behalf of the Honourable John Sweeney, Minister of Community and Social Services. He advised that the Ministry no longer had jurisdiction to decide the appropriate placement for learning disabled children and that our letter notifying them of our intention to investigate this complaint was referred to the Honourable Sean Conway. Upon reviewing this letter, we made further inquiries with staff at the Ministry of Community and Social Services, wherein we were advised that although the original intention, as indicated in Mr. Conway's announcement of August 1985, was that both Ministers would make a joint decision, the Minister of Community and Social Services had not taken an active part in the decision-making process respecting the placements and therefore would not be making any comments on the placement recommendations or decisions. Our investigation with respect to the Ministry of Community and Social Services was therefore terminated.

On February 18, 1986 we received a letter from the Honourable Sean Conway, Minister of Education, in response to both letters sent to Mr. Conway and Dr. Hardy. The Minister reaffirmed his decision and the recommendation by the Committee for placement at Trillium which the Minister believed would offer Mr. R many opportunities for success and continuity beyond June 30, 1986. A copy of this letter was sent to Mrs. R on March 12, 1986, and her written comments were received on April 10, 1986.

This file was assigned to a member of my investigative staff who, in the course of the investigation, met with Mr. Peter Wiseman, Acting Director of the Special Education Branch and Mr. Don Werner, Special

Education Officer, both from the Ministry of Education; Dr. Madeline Hardy, Chairperson of the Review Committee for VRS/LD Placements and the Executive Assistant to the Committee. A copy of Mrs. R's file at the Review Committee offices was obtained following the meeting. Mr. B. Robertson, Director, Provincial Schools Branch, Ministry of Education and Mrs. A who attended the Review Committee meeting with Mrs. R and her son, were also contacted. On February 11, 1986, my investigator attended the Trillium School in Milton and met with Mr. Bill Moffatt, then Program Director for the school, and on February 18, 1986, she attended the private school and met with the headmaster and Mr. R. In addition, my investigator interviewed Mrs. B, a member of the Review Committee, and attended a half-day workshop which she hosted for teachers in North York. Our Office also retained the services of an education consultant who was asked to review this file and provide the Ombudsman with her comments on the placement recommendation made by the Committee. Our investigation revealed the following:

By letter dated September 18, 1985, Mrs. R wrote to Mr. J.D. Kennedy, Regional Director, Central Ontario Regional Office, Ministry of Education, enclosing her brief to the Review Committee for VRS/LD Placements respecting an application for a review by the Committee. This brief included an outline of their family history; a statement from the local Board of Education outlining Mr. R's school experience and the program offered by the Board in the 1985/86 academic year; student progress reports and special education referrals/assessments/ consultations, and other correspondence pertaining to Mr. R's early educational placements and experiences; letters from Ms. E, Speech Pathologist, dated May 20, 1983 and September 4, 1985; detailed letters from Dr. C, Pediatrics and Psychiatry, dated August 26, 1983 and May 24, 1984; a Review Assessment and letter from Dr. D, Psychologist, dated March 15, 1985 and August 28, 1985; a letter from the assistant headmaster of the private school, dated February 25, 1985; and copies of Mr. R's progress reports from the private school.

By letter dated October 28, 1985, the Committee's recommendation and rationale were sent to the Minister of Education and by letter dated November 18, 1985, Mr. Conway advised Mrs. R of his decision respecting her son's placement. The Minister stated that he considered the Trillium School in Milton to be the appropriate placement for Mr. R for the school year 1985-86.

The first complaint brought by Mrs. R was that she considered the decision to place her son at Trillium to be unreasonable as several psychological assessments indicated that he required the highly structured and specific environment provided at the private school and that a change in placement would be detrimental to his education progress.

I have carefully reviewed the numerous reports and letters from various professionals which Mrs. R submitted with her application to the Review Committee. I note that in his initial report of August 26, 1983, Dr. C, Psychiatric Consultant for the private school, was "certainly in

favour of Mr. R attending a very highly structured and stimulating school such as the private school" as he has "seen dramatic responses in youngsters like Mr. R who have been labeled specific learning disabilities" (sic). Dr. C stated that in his view Mr. R was "at risk regarding academic achievement and employment and in fact regarding mental health, unless he has a distinctly corrective experience such as will be provided in the private school setting." Mr. R was enrolled in the private school for September, 1983.

I note too that in his report Dr. C made reference to the previous psychological assessments completed by Dr. D, a psychologist in private practice, who assessed Mr. R in 1981 and 1982. From the sections quoted by Dr. C, I note that in his latter report, Dr. D felt that Mr. R did not have a very successful academic year in 1981 and that this was partially due to his negative attitude, which Dr. D felt was "probably a reflection of the difficulties he has been having with the setting [another private school]." Dr. D stated that "because of the severity of the academic and informational processing problems, without a high degree of motivation, educational success would be a difficult objective [for Mr. R] to attain." Dr. D felt that a "full-time, intensive morning-to-morning specialized education centre may well make a large difference for Mr. R if the result can be more consistent application through a greater degree of external motivation and control...."

I note that Dr. C's subsequent report of May 24, 1984 was completed following a reassessment on March 19, 1984 and after Mr. R had completed grade 9 and had been in attendance at the private school for a period of nine months. He noted that Mr. R had made "impressive progress psychosexually, psychosocially and psychoacademically...." He felt that Mr. R was developing an "aptitude that will make him employable, rather than one of the expensive unemployed.... With his success in the military school setting and his aspirations to join the Canadian Armed Forces, [Dr. C recommended] continuation at [the private school]."

I have also reviewed Dr. D's review assessment of March 15, 1985 wherein he noted the progress made by Mr. R academically and attitudinally, and his letter of August 28, 1985 wherein Dr. D stated his strong feeling that a change in schooling would be a serious mistake. According to the review assessment, Mr. R had shown a significant improvement in reading comprehension (from grade 5 to a range between grade 8 and 10) although his quality of oral reading of sentences and paragraphs, speed of silent reading, spelling and basic computational skills remained the same. Dr. D also noted improvement in Mr. R both socially and attitudinally. He commented that "the resistant, resentful and somewhat unhopeful young man of a few years ago no longer exists and in his place is an ambitious young man, one who hopes, with work, to achieve his potential occupationally." Dr. D went on to state that Mr. R's "desire to join the police force is, for the present, a serious objective.... His intentions to get his grade 12 may well not be out of reach were [Mr. R] to continue improving in his ability to understand the world around him and were he to maintain his present attitude." He noted

that the only setting that Mr. R responded positively to over the years was the highly structured and specialized private school and recommended, if possible, that Mrs. R not take the chance of moving him.

A copy of a letter from the assistant headmaster of the private school, dated February 25, 1985 was also on file. He provided information about Mr. R's experience at the private school and the progress made. The assistant headmaster was of the view that Mr. R was ideally placed and would not benefit from being removed from the private school as he still required the environment "to continue his growth and solidify his present accomplishments."

I note that a copy of a letter dated September 4, 1985 from Ms. E, Speech Pathologist, was also on file. Ms. E indicated that she worked closely with Mr. R for a number of years and had kept in touch with him at the private school. Ms. E stated that "Mr. R's records speak for themselves! He is achieving both scholastically, and in deportment. In order for him to accomplish this 'no mean feat' he has had to reverse his attitude, and learn to accept the discipline required to master academic skills, and to develop life skills." Ms. E went on to state that "before [the private school], [Mr. R's] chances of success in either the academic or working field was low due to poor self-esteem, poor working habits, and a general rebellion against authority. He is now in the middle of a program which has proven itself with him. To discontinue the support at this time, or to change his present placement, would be a great upheaval." Ms. E was of the view that the setting at the private school was appropriate for Mr. R in view of his gains and recommended "that he continue to be supported at [the private school] throughout his academic training."

The Review Committee did not recommend, however, that Mr. R receive funding for his continued placement at the private school. The Placement Recommendation prepared by the Committee stated that:

> ... although [Mr. R] has apparently made good progress at [the private school], it would not be in his best interest to continue there for two reasons:
>
> > [Mr. R] needs two years of further secondary education and funding could be provided at [the private school] for the 1985/86 year only.
> >
> > [Mr. R] needs a less structured environment than [the private school] in order to develop some internal structure and control patterns.

During a meeting with Dr. Hardy and her Executive Assistant, my investigator inquired further into the Committee's reasons for recommending that Mr. R be placed at Trillium rather than the private school. Dr. Hardy advised that, as the Committee noted that Mr. R needed two more years of secondary education, it considered a strategy which

would help him complete his grade 12. A placement at the Trillium School would enable Mr. R to continue in a program beyond the current academic year 1985-86.

With respect to the Committee's comment that Mr. R needed a less structured environment than the private school in order to develop some internal structure, Dr. Hardy advised that in referring to a "less structured environment" the Committee meant a "less strict environment" in terms of control. She stated that based on the Committee's meeting with Mrs. R and Mr. R and the available information in the Committee's file, it was felt that Mr. R needed to learn self-discipline. The Committee believed that at the private school the students are under surveillance and are not given the freedom to make mistakes and be counselled about their mistakes; as such, they may not learn self-discipline, whereas at Trillium, the students are in an environment where they can use their own judgment and if a mistake is made, can receive counselling.

In addition, Dr. Hardy advised that the Committee was of the view that Mr. R needed to acquire "learning and life strategies." Dr. Hardy made reference to the psychologist's report which indicated that Mr. R was disorganized. The Committee felt that Mr. R needed to learn strategies to better organize himself. These strategies would be taught to him at the Trillium School which specializes in providing a structured, skills-related setting to meet the needs of students with specific learning disabilities.

By letter dated July 18, 1986, I advised the Minister of Education and the Chairperson of the Review Committee of my tentative conclusion and recommendation with respect to this issue. I advised that the placement decision appeared to be unreasonable in view of the weight of evidence supporting Mr. R's continued attendance at the private school; the lack of clearly articulated reasons for the Review Committee's recommendation; and the lack of sufficient weight given to Mr. R's own preferences. It was my tentative recommendation that the Minister alter his decision and direct that the Ministry of Community and Social Services provide Mr. R with transitional funding to cover his 1985/86 fees at the private school.

I advised the Minister that we had carefully reviewed the documentation before the Review Committee and noted from it that Mr. R was then nineteen years old and in grade 11. The available psychological and other assessments indicated that Mr. R has at least a mid-average range of intellectual ability; a weakness in general knowledge, concentration, attention, rote auditory memory and visual memory, both verbal and non-verbal; and is functioning well below age-expected grade levels in reading, spelling and math.

We noted that prior to Mr. R's attendance at the private school, his school placements had not been successful. In 1980/81 and 1981/82, Mr. R attended a private school in Toronto and in addition,

received language therapy. It was reported that his lack of academic success in this setting was a reflection of his very negative attitude towards the school. It was recommended that Mr. R would benefit from a full-time specialized setting for adolescents with learning disabilities, such as another private school which Mr. R attended during the 1982/83 academic year. Although Mr. R was considered to have made some academic progress, it was reported that he had spent much of the year rebelling against authority. His mother reported that at this school, Mr. R grew his hair long, wore an earring, a large cross and black leather pants. Mr. R was subsequently enrolled into the private school which is a highly structured and very strict private boys' school based on a military theme. Mr. R is considered to be well suited to and successful in the program/environment offered by the private school.

With respect to Mr. R's placement at the private school, the professional reports referred to above were also drawn to the Minister's attention in my July 18, 1986 correspondence. Further, I noted Dr. Hardy's reference to the necessity for Mr. R to complete two more years of study and the Committee's concern about his placement beyond 1985-86, which appears to assume that Mrs. R is not in a position to find an alternative means to fund her son. It is not clear to me why the Committee made this assumption. It is my understanding that funding for the 1985/86 academic year was not provided on the basis of need.

Further, I noted that my investigator was advised by Mr. Moffatt, then Program Director at Trillium, that over the years, very few students have received their secondary diplomas from Trillium; rather, they are encouraged to return to the regular high school for their diploma. Mr. Moffatt suggested that a stigma may be attached to the student who graduates from a school for the learning disabled.

I also advised the Minister that my investigator visited the private school and met with the headmaster. He advised that upon arrival at the private school, Mr. R had several tattoos, had been dealing in drugs and had other serious family difficulties. In the headmaster's view, Mr. R was the type of person who would have done anything to get what he wanted. Since attending the private school, the headmaster stated that he has seen a great deal of improvement in Mr. R's attitude, etc. He pointed out that Mr. R has been promoted to the second highest rank - that of a master corporal - and is responsible for overseeing the conduct of all cadets and non-commissioned officers.

My investigator also met with Mr. R. He advised that he is very happy at the private school and is confident that he now has an opportunity to succeed in life and make something of himself. Mr. R feels that he has gained a lot from the discipline present at the private school and that it has put him on the right track. I note that after the 1985/86 school year, Mr. R had only one more year before he could obtain his grade 12 diploma. He has expressed interest in pursuing a career in the military or the police force and he believes the private school will play a key role in connecting him with his choice of vocation.

I advised the Minister of my opinion that the evidence submitted on behalf of Mr. R to the Review Committee appears to strongly support his continued attendance at the private school. The professionals noted a distinct, positive change in Mr. R's academic progress, behaviour and attitude since attending the private school. They also noted that many less-structured educational settings had been tried in the past without success and that the highly structured and disciplined environment at the private school brought about a notable and favourable improvement in Mr. R academically, personally and socially. I noted that Mr. R himself is very happy and feels good about himself and believes he has a future.

Notwithstanding the above evidence, I noted that the Review Committee recommended that Mr. R be placed at the Trillium School. It was of the view that he needed a less structured environment to learn self-discipline and to acquire learning and life strategies.

With respect to the Committee's position, I note that there appears to be no evidence to support their conclusion that Mr. R needed a less structured or less strict environment. I understand too that at the time of its recommendation, the Committee had not attended the private school and did not appear to be in a position to comment on the specifics of the environment or setting of the private school. Further, there did not appear to have been evidence before the Committee which suggested that the private school would not assist Mr. R in learning self-discipline.

In considering the above, as well as Mr. R's age; his past history in several different forms of less structured private schools; his academic, personal and social success at the private school; and his vocational desires and preference to remain at the private school, I advised the Minister and the Chairperson that I was of the tentative opinion that the Committee's recommendation that Mr. R be placed at Trillium and the Minister's decision to accept this recommendation were unreasonable.

On September 18, 1986, I received a response from the Minister of Education also on behalf of Dr. Hardy, Chairperson of the Review Committee. The Minister advised that in his opinion, the recommendations of the Review Committee reflected a careful and knowledgeable assessment of Mr. R's needs and an objective choice of an appropriate placement. He pointed out that the staff at Trillium are specialists in the field of learning disabilities and other exceptionalities, whereas to his knowledge, the staff at the private school are not. The Minister questioned whether Mr. R would continue to progress after the external control imposed upon him in the private school's environment is removed.

I have carefully reviewed and considered the representations made to me by the Minister of Education. I am not persuaded by his comments and I am concerned that he may have misinterpreted our investigative findings. As Ombudsman I am not substituting my opinion

for that of the Review Committee. It is my view that given the weight of professional opinions, including those with no vested interest in the private school, all of which recommended maintenance of the existing, successful placement; the lack of clearly articulated reasons for the Review Committee's recommendation; and the lack of sufficient weight given to Mr. R's own views on the situation, especially in light of his chosen career path, the decision to place Mr. R in the Trillium School was unreasonable.

After considering all of the information gathered during the course of our investigation into Mrs. R's complaints, I have concluded pursuant to section 22(1)(b) of the Ombudsman Act that:

> The placement decision appears to be unreasonable in view of the weight of evidence supporting Mr. R's continued attendance at the private school; the lack of clearly articulated reasons for the Review Committee's recommendation; and the lack of sufficient weight given to Mr. R's own preferences.

Further, it is my recommendation pursuant to section 22(3)(g) that:

> The Minister alter his decision and direct that the Ministry of Community and Social Services provide Mr. R with transitional funding to cover his 1985/86 fees at the private school.

My final conclusions and recommendation were reported to the Minister on November 28, 1986 and, pursuant to the discretion given to me under section 22(4) and (5) of the Ombudsman Act, I referred the matter to the Premier on March 9, 1987. Mrs. R was also advised of the results of my investigation at that time and the file was closed.

DETAILED SUMMARY NO. 11

In an interview on December 2, 1985, Mr. and Mrs. C registered a complaint against the recommendation of the Review Committee for VRS/LD Placements and the subsequent decision of the Minister of Education and the Minister of Community and Social Services to place their son, Tim, at a public school for the 1985-86 school year.

By letters dated December 10, 1985, Dr. Madeline Hardy, Chairperson, Review Committee for VRS/LD Placements, the Honourable Sean Conway, Minister of Education, and the Honourable John Sweeney, Minister of Community and Social Services, were advised of the Ombudsman's intention to investigate Mr. and Mrs. C's concerns. We advised that Mr. and Mrs. C contended that the public school program was not as comprehensive or as capable of providing specialists as the private school, and that the adequacy of the program had not been demonstrated to them by the Minister or the Committee. Other contentions were made by Mr. and Mrs. C which I did not support and, for the purposes of this report, they are omitted.

We invited the Chairperson and the Ministers to provide my Office with any comments they wished to make on these contentions. On January 31, 1986, we received a response from Mr. Sweeney, Minister of Community and Social Services. He advised that his Ministry no longer had jurisdiction in the placement for learning disabled children and, in view of this, Mr. Sweeney did not believe it would be appropriate to offer comments on the recommendations of the Committee and therefore our letter was referred to the Honourable Sean Conway, Minister of Education. Upon reviewing Mr. Sweeney's letter, my staff made further enquiries with staff at the Ministry of Community and Social Services wherein we were advised that, although the original intention, as indicated in Mr. Conway's announcement of August, 1985, was that both Ministers would make a joint decision, the Minister of Community and Social Services had not taken an active part in the decision-making process respecting the placements and therefore would not be making any comments on the recommendations or decisions. My investigation with respect to the Ministry of Community and Social Services was therefore terminated.

On February 24, 1986, we received a letter from the Honourable Sean Conway, Minister of Education, in response to both letters sent to him and Dr. Hardy. A copy of this letter was sent to Mr. and Mrs. C on March 12, 1986 and they were invited to provide us with their comments. On April 24, 1986, we received written comments on the Minister's letter from Mr. and Mrs. C.

In the course of our investigation a member of my investigative staff met with Mr. Peter Wiseman, Acting Director of the Special Education Branch and Mr. Don Werner, Special Education Officer, both from the Ministry of Education; Dr. Madeline Hardy, Chairperson, Review Committee for VRS/LD Placements, and her Executive Assistant. A copy of Mr. and Mrs. C's file at the Review Committee Offices was also obtained.

In addition, my investigator interviewed Mrs. B, a member of the Review Committee, and attended a half-day workshop she hosted for teachers in North York.

On February 14, 1986, my investigator attended the private school and met with the Director, and subsequently interviewed Mr. D, School Superintendent with the local Board of Education. She also attended an information meeting on the evening of April 16, 1986 respecting Bill 82 and contacted Mr. Whittaker, Education Officer at the Ministry of Education, to discuss issues related to Mr. and Mrs. C's concerns about the lack of information made available to them and the Committee by the School Board about the public school program.

My Office also retained the services of an education consultant who was asked to provide general information and advice concerning various aspects central to the Special Education process under the Education Act. She was also requested to review the file and provide her comments on the placement recommendation made by the Committee in order to assist my investigative staff in their understanding of special education issues. Our investigation has revealed the following:

At the time of the review, Tim C was thirteen years old and identified as severely learning disabled with problems specific to speech and language and an overall intelligence within the mentally deficient range. Since 1981, he has been attending a private school which offers programs for pupils with learning disabilities. The cost of his tuition fees had been previously funded under the Vocational Rehabilitation Services (VRS) program; however, this funding was discontinued effective September 1, 1985 pursuant to amendments to the Vocational Rehabilitation Services Act and Regulation. This change was scheduled in 1981 just after the Education Act was amended in 1980 requiring all school boards to have special education programs and services available for learning disabled students effective September 1, 1985.

By letter dated March 28, 1985, Mr. D, School Superintendent, and Mr. E, Assistant Superintendent (Acting), both from the local Board of Education, wrote to Mr. and Mrs. C to request that they notify the local Board whether it was their intention to return Tim to the school system administered by the local Board of Education.

By letter dated April 17, 1985, Mr. and Mrs. C wrote to the local Board regarding a suitable placement for their son for the 1985/86 school year in the public school system. They requested information about the program the Board could provide. They were advised by the Board that the information they requested would not be available until an Identification Placement Review Committee (IPRC) meeting was held.

Subject to Mr. and Mrs. C enrolling their son in the public school system, on June 18 and 26, 1985, IPRC meetings were held and the Committee determined that Tim was "an exceptional pupil" as defined in the Education Act and that the appropriate placement was special

education (language). The location of this placement was at the public school.

Mr. and Mrs. C wanted specific information about the placement, such as a detailed program description. They also wanted to observe the program and interview the teachers as well as the consulting and supervisory staff. Mr. and Mrs. C have advised that the school board refused their request and would not provide them with any of the requested information.

In view of the Board's failure to provide them with specific program information, Mr. and Mrs. C felt that they had no choice but to keep their son at the private school for the 1985-86 school year and apply to the recently announced Review Committee for VRS/LD Placements for transitional funding.

By letter dated September 17, 1985, Mr. and Mrs. C wrote to Mr. J.D. Kennedy, Regional Director, Ministry of Community and Social Services, to request a review of their son Tim's educational placement by the Review Committee. Along with their application they enclosed a number of professional and other supportive documents. This information was forwarded to the Review Committee.

On November 12, 1985, Mr. and Mrs. C attended a Review Committee meeting. Following the review, the Committee submitted a placement recommendation to the Minister of Education for a decision. By letter dated November 21, 1985, the Minister advised Mr. and Mrs. C that based on the Committee's recommendation, the placement offered by the local Board of Education for the school year 1985-86 was considered appropriate.

In his February 1986 letter, Mr. Conway stated that the Committee based its placement recommendation on the documentation submitted with Mr. and Mrs. C's application and the additional information they provided during the review meeting. On the basis of this information, and the Review Committee's recommendation, the Minister was of the view that the public school placement was appropriate.

In noting their dissatisfaction with the Review Committee's recommendation and the Minister's decision, Mr. and Mrs. C believed that there was insufficient information available to the Committee about the public school program and that it ought to have investigated further. Mr. and Mrs. C submitted that before a determination could be made about the appropriateness of the public school placement, the following information was needed: information about the amount of speech and language therapy available per week; the strategies, methods and adaptations that the teachers will use to help the student learn and perform better; and the immediacy and availability of remedial and content educational teaching materials and equipment for the student. Mr. and Mrs. C also believed it was necessary to observe the program and interview the teachers as well as the consulting and supervisory staff.

According to the Review Committee's terms of reference, the Committee was to receive and review applications from parents or guardians of only those pupils funded in 1984/85 by the Ministry of Community and Social Services under the VRS program; assess the pupil's needs and recommend an appropriate placement for the pupil for the 1985-86 school year to the Ministers of Education and Community and Social Services. The Committee also obtained a release signed by parents empowering the Committee to obtain information pertinent to the pupil's needs which could be useful to the Review Committee.

Dr. Hardy and another Committee member advised my investigator that parents were requested to submit specific information with their application to the Committee and if anything was missing from the application, the Committee would make the appropriate inquiries. Dr. Hardy advised that the Committee would contact the school board to confirm the placement they were offering and that it was still available. The Committee did not inquire into such matters as teacher qualifications, teaching methods or the individual pupil plan. Dr. Hardy stated that this was the responsibility of the board and the teacher involved, and was not part of the Committee's mandate.

The Review Committee file contained a copy of Tim C's IPRC report dated June 26, 1985. This report indicated that Tim was considered an "exceptional pupil" and that the appropriate placement was special education (language). No other details about the placement were made available in this document.

I note that following their November 1986 meeting with Mr. and Mrs. C, the Review Committee contacted Mr. D, School Superintendent, local Board of Education, regarding the special education program. Mr. D advised that the teacher/student ratio was 1:6 with a half-time teaching assistant; that a speech/language pathologist was on staff; and that the special education language program was a Metro Board program, which means that it is a language program set up for the needs of only those children with severe problems in the Metro-wide area.

Dr. Hardy advised that the Committee was of the view that it had sufficient information to make a recommendation that Tim be placed at the public school.

Mr. and Mrs. C were not satisfied with the Review Committee's response. They did not feel that the Committee gave any consideration to why they chose to return Tim to the private school and why they did not accept the offer of the local Board in June 1985. Mr. and Mrs. C advised my investigator that they apprised the Review Committee of their experience with the local Board. Mr. and Mrs. C stated that in a letter dated April 17, 1985 (a copy of which was in the Review Committee file), they asked the local Board for written assurance that the program at public school was appropriate for their son. They did not understand why the Board could not tell them details about the program: Mr. and Mrs. C stated that they visited the public school, but no one could tell them

how the program would help Tim or even what kind of class he would attend; further, the speech and language pathologist could not tell them how many hours of language therapy Tim would receive. Mr. and Mrs. C were of the view that the Review Committee did not make sufficient effort to obtain the information necessary to make an informed recommendation and too readily accepted the explanations and minimal program information offered from the local Board.

Mr. and Mrs. C believe that in view of the historical problems experienced with the Board, of which the Committee was aware, it was essential for the Committee to request enough information from the Board to make an informed and knowledgeable recommendation as to the appropriateness of the Board's placement offer. Mr. and Mrs. C complained that the Committee's placement recommendation was based on an imprecise and vague description of the Board's program and, on this basis, the Minister ought not to have accepted it.

To address Mr. and Mrs. C's concerns about the standard of inquiry made by the Review Committee, our investigation turned to a further examination of why the Committee did not obtain a description of the individual pupil program such as that requested from the school board by Mr. and Mrs. C.

The Committee's terms of reference gave it the mandate, in part, to identify the needs of the pupil and recommend appropriate placement for the pupil for the 1985/86 school year. In the course of accepting the placement offer made by the Board as "appropriate", the Committee did not consider it part of its responsibility to obtain program details from the Board. It is my understanding that its inquiries focused only on such general information as the availability of a placement, the physical location, the size of the class, and future integration.

In the course of our investigation, I learned that the amount of placement information provided to parents by Boards of Education has varied. Some Boards have taken the position that parents can be provided with basic information about placement such as location, class size, teacher qualifications if the teacher has been hired, and, in some instances, the availability of professional support staff, prior to the student's attending class. But, as the details about the individual pupil plan are developed by the teacher after the student is in the classroom, it has been the Boards' position that this information cannot be made available before the commencement of the school year, that is, not until the student has been in the classroom for a period of time.

However, we have also been apprised of cases (one of which involved a transfer of a student from a private school setting to the public system in September 1985) where the Board officials actually provided the parents with written descriptions of the proposed programs. In one particular case, a special education consultant outlined in writing the program details pertaining to the teaching strategies,

methods and services (equipment) to be used. I understand, however, that these cases are considered to be unique in that Boards are reluctant to discuss program details until after the student has been placed. Notwithstanding this, the fact that Board officials in these cases have provided program details indicates to me that the provision of more detailed information to parents and, in turn, to the Review Committee, prior to the student's attendance in the classroom, may well have been possible and was, in my view, necessary for a proper determination of an appropriate placement.

Keeping in mind the unfavourable past experience which Mr. and Mrs. C encountered with respect to their son's academic progress in the public school system, against his present academic success in the private school setting, it is understandable that they would not accept the Board's offer in the absence of information about the manner in which it intended to deal with their son's learning and language impairments.

While I am not questioning the new direction in which the Education Amendment Act is leading education in Ontario, I believe that the Review Committee may have construed its mandate too narrowly. I understand that the Minister of Education established the Review Committee in August of 1985 out of a concern that learning disabled pupils still in a private setting in 1984/85 were properly placed in the 1985/86 academic year. The Committee, while acting as an advisory body to the Minister, was entrusted with the responsibility to review and recommend appropriate placement for the transitional year 1985/86. It would appear to me that the Review Committee ought to have had before it sufficient program information about the Board program, and not merely accepted that a placement existed, in order to satisfactorily fulfill its duty to recommend a placement that is appropriate.

Upon completion of our review of these issues, I notified the Minister of Education and the Chairperson of the Review Committee of my tentative conclusions and recommendation. These conclusions were that in the absence of a more detailed description of the individual pupil program, the recommendation of the Review Committee that Tim C's placement be with the public school may have been unreasonable, and that the decision of the Minister to accept the Committee's recommendation in the absence of a more detailed description of the individual pupil program may have been unreasonable. It was my tentative recommendation that the Minister alter his decision and direct that the Ministry of Community and Social Services provide Tim C with the transitional funding to cover his 1985-86 fees at the private school.

On February 9, 1987, I received a response from the Deputy Minister of Education, Dr. Bernard J. Shapiro, concerning these issues. The Deputy stated that he remained convinced that for the school year 1985-86, the Board could have offered an appropriate special education program for Tim. He indicated that the mandate of the Review Committee was to assess each child's needs and to recommend an appropriate placement. The members of the Review Committee were chosen from among

the most prominent professionals in the field of services for children with special needs. The specific members on each case reviewed and assessed the documentation provided by the parent, and, where it was deemed appropriate, contacted the local school board, private school or other service provider for additional information or clarification. He noted that the recommendations to the Ministers of Education and Community and Social Services reflected the placement which, in their professional judgment, was deemed to be appropriate for the school year 1985-86.

Dr. Shapiro further noted that in Mr. and Mrs. C's case, the Board did conduct an Identification Placement and Review Committee meeting on June 18 and June 29, 1985. Its determination was that Tim was an exceptional pupil and that the special education language program offered at public school was appropriate. It was the Deputy Minister's understanding that Mr. and Mrs. C did not initiate further discussion with the IPRC, nor did they give notice of appeal, in accordance with Ontario Regulation 554/81. The Deputy Minister noted that in light of the Supreme Court of Ontario decision (Townsend v. Board of Education for the City of Etobicoke, 1986), which held that children not enrolled in a school board are not entitled to an IPRC hearing, it was his opinion that the local Board of Education demonstrated a willingness, in excess of its legal obligations, to meet Tim C's educational needs and to provide an avenue of appeal to the parents. The evidence indicates that Mr. and Mrs. C chose not to exercise their rights under the legislation, but placed Tim in a private school setting.

In noting what constitutes a special education program under the requirements of the Education Act, Dr. Shapiro noted that it is the responsibility of the individual classroom teacher to develop an educational plan and of the individual speech-language pathologist to develop the speech-language treatment plan based on their personal contact with the pupil. It was the Deputy Minister's opinion that the Board could have described a comprehensive and detailed plan which, having been developed solely on the data provided by Mr. and Mrs. C, would have been totally inappropriate for the needs of the pupil in terms of implementation in the classroom and treatment setting.

Dr. Shapiro noted that the Metro-wide special education program offered at public school is recognized as a comprehensive model in meeting the needs of severely learning disabled pupils, especially in the areas of language deficits. In the Deputy Minister's opinion, the Review Committee was comfortable with their knowledge of the program, or if not, could have contacted the Board for further information or clarification.

Further, the Deputy Minister felt that Mr. and Mrs. C continued to base their apprehensions regarding the current abilities of the Board to provide an appropriate program on specific events that happened several years ago. According to Dr. Shapiro, the fact that Mr. and Mrs. C reported disillusionment with the Board and disagreement with the

recommendations of the Review Committee does not alter the fact that it is the opinion of both the Committee and the Board that the latter could have provided an appropriate special education program.

Having carefully considered the Ministry's position, it is my view that the recommendation of the Review Committee and the decision of the Minister to accept their recommendation that Tim C be placed in the public school program, in the absence of a more detailed description of the educational program, were unreasonable. In the absence of such a description, the Minister ought to have granted Tim continued funding for his education at the private school.

After considering all of the information gathered during the course of our investigation into Mr. and Mrs. C's complaints, I have determined pursuant to section 22(1)(b) of the Ombudsman Act that:

1. The recommendation of the Review Committee that Tim C be placed with the public school, in the absence of a more detailed description of the individual program, was unreasonable.

2. Further, the decision of the Minister to accept the Committee's recommendation, in the absence of a more detailed description of the individual pupil program offered by the Board, was unreasonable.

It is my recommendation pursuant to section 22(3)(g) of the Ombudsman Act that:

> The Minister alter his decision and direct that the Ministry of Community and Social Services provide Tim C with transitional funding to cover his 1985/86 fees at the private school.

My final conclusions and recommendation were reported to the Minister on February 20, 1987 and, pursuant to the discretion given to me under section 22(4) and (5) of the Ombudsman Act, I referred the matter to the Premier on March 18, 1987. Mr. and Mrs. C were also advised of the results of my investigatiion at that time and the file was closed.

DETAILED SUMMARY NO. 12

On March 4, 1986, Ms. G contacted my Office to register a complaint against the Ministry of Health, stating that the Ministry's failure to provide OHIP Dependent Coverage for her household was unreasonable and discriminatory.

Ms. G's complaint involves herself and her mate who are a lesbian couple. They have cohabited for eight years. She advised us that when her employer submitted an Application for Dependent Coverage to OHIP for herself and the other members of her household, which includes her mate and her mate's two children, OHIP denied this request.

Following the completion of some preliminary legal research on the issues raised by Ms. G and after obtaining clarification from the complainant on the status of her complaint, on June 27, 1986, Dr. Allan Dyer, Deputy Minister, Ministry of Health, was advised of my intention to investigate Ms. G's complaint as summarized above.

On August 6, 1986, Dr. Dyer responded to our letter and advised us that "dependant" as defined in clause 1(c) of Regulation 452, means a resident who is the "spouse" of an insured person. He stated that Ontario laws recognize marriages which exist between members of the opposite sex. The term "spouse" found in other Provincial legislation, for example, the Family Law Act, 1986, defines the term "spouse" as "... either of a man and woman ...." He noted that it would be inappropriate to recommend to the Lieutenant Governor in Council that a regulation be made amending the definition of the term "spouse" in clause 1(c) in a manner that would be at variance with the definition of the term "spouse" found in other provincial legislation.

The Ministry's present practice has been in place since OHIP's inception in 1972.

During the course of the investigation, interviews were conducted by my staff with Mr. Gibson, General Manager, OHIP; Ms. Hazel DeRozario, Manager, Special Services Unit, OHIP; legal counsel at the Ministry of Health; staff at the Canadian Human Rights Commission, the Quebec Human Rights Commission, and the Ontario Human Rights Commission; Ms. Evelyn Gigantes, M.P.P., Ottawa-Centre (Critic for the Attorney General and Women's Issues); Ms. Nadine Nowlan, Alderman Ward 5 and Chairperson for the Equal Opportunity Committee for the City of Toronto; and legal counsel for the Ministry of Community and Social Services. As well, extensive legal research was undertaken.

On December 22, 1986, after reviewing all of the evidence pertaining to Ms. G's complaint, I wrote to the Honourable Murray Elston in accordance with section 19(3) of the Ombudsman Act to advise him of my tentative conclusion and recommendations. It was my tentative conclusion that the Ministry of Health's denial of OHIP Dependent Coverage to Ms. G

was in accordance with a practice which is contrary to law and improperly discriminatory.

My tentative recommendations were that (1) the Ministry of Health immediately change its administrative practice and include same-sex couples as "dependants" in clause 1(c) of Regulation 452 and, (2) the Ministry of Health make and submit to the Lieutenant Governor in Council for approval, an amendment to clause 1(c) of Regulation 452 of the Health Insurance Act which would replace clause 1(c)(i) dealing with "spouse" with a more comprehensive section to deal with "dependants".

I also suggested that the proposed amendment reflect a gender-neutral definition of "spouse" based on economic considerations.

I advised that my tentative conclusion and recommendations were based on the following information:

In March 1985, Ms. G's employer made an application on her behalf for OHIP Dependent Coverage. On March 25, 1985 the Ministry of Health rejected this request. On October 21, 1985, Ms. G's employer again made a formal application for Dependent Coverage to OHIP, requesting a clear and reasoned response. On January 31, 1986 the Ministry rejected this application stating that a liaison between two people of the same sex did not fulfill its criteria for "dependants" pursuant to clause 1(c) of Regulation 452 of the Health Insurance Act, R.S.O. 1972. Ms. G subsequently appealed this decision to the Ministry of Health on February 24, 1986 and asked also for an amendment to the Health Insurance Act which would include her family members and other similarly situated people in non-traditional families. On May 5, 1986 the Ministry of Health reiterated its previous response and rejected Ms. G's request for coverage.

It is my understanding that OHIP's administration of Dependent Coverage is based on clause 1(c) of Regulation 452 pursuant to the Health Insurance Act which states:

> (c) "dependant" means a resident who is,
>
> (i) the spouse of an insured person, or
>
> (ii) a child of an insured person who is dependent for support upon the insured person or upon the spouse of the insured person and who is,
>
> (A) under the age of twenty-one years and unmarried, or
>
> (B) twenty-one years of age or over, mentally or physically infirm and dependent for support upon the insured person or upon the spouse of the insured person, before his twenty-first birthday, but does not include the spouse of any such child;

Legal counsel at the Ministry of Health advised my investigator that clause 1(c) of Regulation 452 is based on preceding legislation from other Acts dating back to 1967. When the Health Insurance Act was passed in 1972, clause 1(c) was simply lifted from preceding legislation as there was no time to draft new legislation and consider if the preceding legislation was appropriate or not. The clause was lifted from two sources including Regulation 1 pursuant to the Hospital Services Act, R.S.O. 1967 and Regulation 326 pursuant to the Health Services Insurance Act, R.S.O. 1969. It would appear that clause 1(c), as it is worded today, is at least 20 years old.

Neither the Act nor the Regulation thereunder defines the term "spouse". I understand from the Ministry of Health that OHIP's practice in defining "spouse" includes the following:

> The Living Webster Encyclopedic Dictionary of the English Language defines "spouse" as meaning "a married person; husband or wife". Collins Dictionary of the English Language defines "spouse" as meaning "a person's partner in marriage". Black's Law Dictionary gives the meaning of "spouse" as "one's wife or husband".

During this investigation, I have also considered the following:

1. The social policy leading to the formation of OHIP included a desire to provide universal government health insurance to all people in the province designating the provincial government as the sole exclusive insurance carrier and consequently legislating the demise of the existing prepaid insurance plan. Considering the principles of equity and equality, it seems appropriate that delivery of a universal service such as OHIP would promote accessibility so that as many Ontarians as possible could participate in the program. Thus, the word "dependant" in clause 1(c) of Regulation 452 pursuant to the Health Insurance Act should be interpreted in its broadest sense to include as many actual dependent relations as possible.

It is our understanding that such an approach is already taken with respect to children who may be claimed as "dependants" by adults who, while not their natural parents, are providing for their needs. In the same way an aunt might provide for a niece or a nephew and in that circumstance the "dependant" status should determine the entitlement to OHIP coverage. In a similar way, a broad interpretation of the word "dependant" as it applies to adult relationships would provide for the widest possible participation in the hospital insurance scheme and the most equitable arrangements for premium payments.

2. Section 1 of the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as could be demonstrably justified in a free and democratic society.

Section 15(1) states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Many commentators have suggested how the courts should interpret section 15 of the Charter and these commentators clarify that the list in section 15 is not exhaustive and that it is implied within that section that "sexual orientation" may be read into the grounds of discrimination. (Authorities include: The Boyer Commission; Equality for All: Report of the Parliamentary Committee on Equality Rights; Canadian Government Publishing Centre: Ottawa, 1985; and Hogg, Peter, Canada Act 1982 Annotated; Toronto: Carswell, 1982.) I suggest that these authorities, including the government sponsored report, are in keeping with a reasonable interpretation of section 15.

3. The Ontario Human Rights Code R.S.O. 1981

Bill 7 received its third and final reading on December 16, 1986 with the inclusion of the "sexual orientation" amendment. The new law states in section 1 of the Ontario Human Rights Code that, "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap." Ms. Evelyn Gigantes, M.P.P. Ottawa-Centre, NDP critic for the Ministry of the Attorney General and Women's Issues, spoke with my staff on September 5, 1986 about the "sexual orientation" amendment. She advised my investigator that when she proposed Bill 7 it was her intention to include gay couples in any extension of government benefits.

4. Through the Quebec Charter of Human Rights and Freedoms, 1982, the province of Quebec specifically includes "sexual orientation" as a prohibited ground of discrimination. We have been advised by officials at the Quebec Human Rights Commission that a claim such as Ms. G's would be successful in Quebec pursuant to section 12 of the Quebec Charter of Human Rights and Freedoms which specifies that no one may, through discrimination, refuse services ordinarily offered to the public. OHIP is a government service ordinarily offered to the public.

5. The Ontario Family Law Reform Act, R.S.O. 1986 states in section 1(1) that "'Spouse' means either of a man and woman who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act." The Act also states in section 29 that "'spouse' means a spouse as defined in subsection 1(1) and in addition includes either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

When a heterosexual couple applies for OHIP Dependent Coverage they merely swear a declaration that they are "dependants". They do not have to fulfill statutory or common-law requirements for spouses. In other words, they could have been living together for only one day and they would be considered "spouses" within OHIP requirements. It appears that in practice the test for "dependant" is based on heterosexuality. Meeting the criteria for the legal definition of "spouse" is not considered. **Regardless of the law in question, OHIP is in a position to offer family coverage to non-traditional families if it chooses to do so because its practice is administrative and not legal. A precedent for broadening the interpretation of "spouse" already exists in OHIP's administrative practice of extending coverage to non-related but dependent children.**

6. It has been estimated that there are over 850,000 Ontarians and approximately 2,000,000 Canadians who may face discrimination because they are gay. For example, in the "marriage" sphere, heterosexual married individuals enjoy benefits which include substantial tax benefits, tort recovery for wrongful death, intestate succession, spousal employment benefits and perquisites, funeral leave for death of spouse, to mention a few. Whenever the extension of a benefit is based on marriage, gay families are automatically excluded. In this case, the question logically to be answered is, irrespective of sexual orientation, do Ms. H and her children qualify as dependants as one would reasonably define "dependant". In my opinion they do.

7. Since OHIP's inception in 1972 there have been many important changes in Ontario families. The traditional paradigm nuclear family with one man, one woman and two children has been joined by statutory common-law spouse families, single parent families, and many other varieties of non-traditional families including same-sex families. In Ontario today there are many variations of families that are acceptable to the community at large. In 1972, OHIP's practice may have resulted in coverage to most of the persons in dependent relationships; in 1986, however, the variety of dependent relationships has increased, and the practice as developed more than a decade earlier is no longer adequate.

8. Recently the Ontario provincial government's Ministry of Community and Social Services changed their "spouse in the house" rule. Presently, when a person of the opposite sex resides with the sole support parent on benefits, the parent loses eligibility, if the Ministry is of the view that they are living together as husband and wife. In general terms, the government proposes to move towards a primarily economic standard which would appear to permit eligibility for a sole support parent unless that parent resides with another person who:

1) provides economic support for the parent or his or her dependent children and accepts parental responsibility for the children; or

2) has a legal obligation to support the parent or his or her dependent children.

Legal Counsel at the Ministry of Community and Social Services advised staff at my Office that as of April 1987, under the revised system it has proposed, a woman living in a lesbian relationship could be deprived of Family Benefits. It seems reasonable that if a homosexual couple can be penalized for their "dependant" relationship insofar as one government service is concerned, they should also be able to benefit from another government service offered to "dependants".

9. Recently, many changes have evolved in regard to the availability of benefits for non-traditional families. For example, the Vancouver Municipal Regional Employees Union has successfully negotiated benefits for gay clerical and support staff employed by the Vancouver School Board and the Langara College Student Union. Equality provisions included with the benefit package give same-sex partners access to medical, dental and other entitlements, such as compassionate leave, that were already available to heterosexual couples. In Ontario, CUMBA (insurer for the Toronto Public Libraries) has been offering family coverage to same-sex families for extended health care benefits since November 1985; the Toronto Public Libraries are taking advantage of this service and offering these benefits to their employees. Confederation Life has been offering family coverage to same-sex families for extended health care benefits since August 1986; staff at OISE are taking advantage of these benefits. A report by the City's Finance Department says homosexuals employed by the City of Toronto should be entitled to family health benefits for live-in partners of the same sex. The City is currently reviewing this situation. The YWCA in Toronto recently accepted a collective agreement subsuming a new definition of "spouse" which includes common-law, lesbian and homosexual partners. Any benefits offered to spouses will include all these groups unless the YWCA is prohibited under law from offering the benefit.

Rights are generally a balancing of interests. Recently the concept of pay equity has been introduced into the public and private sector. Many individuals do not favour "pay equity", but they are obliged to accept it. If we can accept that two people similarly situated in the workplace should be paid at the same rate, regardless of gender, it seems to follow that we may be ready as a society to accept that a worker with a homosexual mate should receive the same work-related benefit as a worker with a heterosexual mate. The Monthly Labour Review in the United States recently reported in a survey of various white collar occupations that fringe benefits were found to constitute nearly 40% of an employer's average outlay for labour expenses. Since gay families may have to subsidize these benefits out of their own pockets, the result is a wage rate based on sexual orientation.

OHIP's practice in enforcing Dependent Coverage may have been proper in the past. However, when one considers the Charter, Bill 7, the Quebec legislation, changing government policies, and changing concepts of family benefits elsewhere in the province and country, OHIP's administrative practice appears dated and inappropriate.

Accordingly I have concluded, pursuant to sections 22(1)(a) and (b) of the Ombudsman Act, that the decision of the Ministry of Health to deny OHIP Dependent Coverage to Ms. G because she did not come within their meaning of "dependant" in clause 1(c) of Regulation 452 pursuant to the Health Insurance Act, is in accordance with a practice which is contrary to law and improperly discriminatory.

Accordingly I recommend pursuant to sections 22(3)(d) and (g) of the Ombudsman Act that:

(1) the Ministry of Health immediately change its administrative practice and include same-sex couples as "dependants" in clause 1(c) of Regulation 452.

(2) the Ministry of Health make and submit to the Lieutenant Governor in Council for approval, an amendment to clause 1(c) of Regulation 452 of the Health Insurance Act which would replace clause 1(c)(i) dealing with "spouse" with a more comprehensive section to deal with "dependants".

In concluding this report, I suggested that the proposed amendment reflect a gender-neutral definition of "dependant" based on economic considerations.

On February 20, 1987, my report was sent to the Ministry of Health. Also on February 20, 1987, the Deputy Minister of Health sent me an interim response to my tentative submission of December 22, 1986, wherein he advised that he intended to respond upon completion of his review of the matter, which was currently in process. He believed I had raised an issue with broad policy implications which warranted their careful consideration.

Subsequently I have received no further information from the Ministry of Health. On March 18, 1987 I advised Dr. Dyer of my decision to include this case in my 1986-87 Annual Report, notwithstanding his interim response of February 20, 1987.

DETAILED SUMMARY NO. 13

On April 22, 1986, Mrs. BB contacted our Office and expressed her dissatisfaction with the Workers' Compensation Board Appeal Board decision dated July 13, 1984. Mrs. BB contended that she should have received further entitlement, subsequent to August 19, 1982, for her respiratory complaint.

On May 7, 1986, Dr. Robert G. Elgie, Chairman of the Workers' Compensation Board, was notified in accordance with the requirements of the Ombudsman Act, of our intent to investigate Mrs. BB's objection. Dr. Elgie was also asked whether he was prepared to make a statement of the Board's position on Mrs. BB's objection. On May 30, 1986, a response was received, indicating that the Board did not wish to make a statement at that time.

Mrs. BB's file was assigned to Mrs. C. Sealey, a member of my investigative staff. Mrs. Sealey thoroughly reviewed Mrs. BB's Workers' Compensation Board file and considered the relevant legislation and Board policy in relation to the issue.

The medical documentation revealed that Mrs. BB had been receiving monthly allergy shots from Dr. A, her family physician, since the mid-1970s. She made no complaints of any breathing difficulties until October 1981 and, by November 1981, Mrs. BB complained to Dr. A of increasing breathing problems.

In November 1981 Mrs. BB, at age 45 and employed as a library assistant, reported to her employer that she was experiencing breathing difficulties which she related to fumes from a photocopier at work. Mrs. BB laid off work on November 11, 1981.

Dr. A referred Mrs. BB to Dr. C, Director of Pulmonary Services at an Ontario city hospital. In his December 8, 1981 report, Dr. C indicated that he had examined Mrs. BB because she was experiencing shortness of breath. He noted that, five years previously she had been skin-tested and was found to be reactive to dust and mould. A chest x-ray revealed no abnormalities. Dr. C was of the opinion that it was "highly probable" that Mrs. BB was suffering from mild asthma aggravated by her dusty work environment.

On December 22, 1981 Dr. C reassessed Mrs. BB, who indicated that her respiratory symptoms had resolved and she was no longer short of breath. Dr. C reported that an exercise and other tests showed normal results and were not suggestive to any great extent of airways irritability. Dr. C was of the opinion that, notwithstanding the results of the investigations, Mrs. BB's symptoms were still suggestive of mild airways irritation which was possibly related to her work exposure to dust and probably some chemicals from the photocopying machine. Dr. C indicated that he had written to Mrs. BB's employer, with a recommendation that she be considered for another position.

Mrs. BB laid off work from November 11, 1981 to January 4, 1982 when she returned to her regular work. However, by January 20, 1982, Mrs. BB laid off again with complaints of increased breathing problems. Dr. A advised the Board that, when Mrs. BB was examined on January 18, 1982, her main symptoms at that time were that her eyes were burning and her lung was itchy. A repeat pulmonary function test was normal.

In April 1982, Dr. D, a Board physician who specializes in industrial diseases, requested that the Occupational Health Branch of the Ministry of Labour obtain information regarding the contents of the toner that was used in the Xerox machine. By July 1982 Dr. D had still not received the requested information. Dr. D noted that, "some of the toners give off styrene fumes and others give off ammonia fumes." Without the benefit of the requested information, Dr. D concluded that Mrs. BB's respiratory symptoms appeared to be related to her employment. Mrs. BB was granted temporary total benefits until she returned to work on March 15, 1982.

Between March 15, 1982 and August 19, 1982, when Mrs. BB laid off work again, she was given a new job which involved opening mail and parcels and distributing them. Mrs. BB advised a Board representative that the opening of the packages aggravated her condition as the packaging material contained a large degree of dust. Mrs. BB added that she complained to her supervisor, Mrs. E, of experiencing breathing problems. However, Mrs. E denied having any knowledge of Mrs. BB's complaints of experiencing difficulty in breathing during the above interval. In his September 3, 1982 letter, Dr. A felt that Mrs. BB would have been capable of returning to work on September 7, 1982, but not to a dusty working area.

Dr. A submitted a report dated October 3, 1982, which revealed that subsequent to March 15, 1982, he had treated Mrs. BB monthly with allergy injections for a dust allergy. He added that, in August and September 1982, Mrs. BB was treated for asthma, chest pain and "anxiety due to work stress." Dr. A reported that Mrs. BB had a prolonged session of counselling due to her problems at work. He was of the opinion that Mrs. BB's breathing problems were "truly related" to her dusty environment and "aggravated by the attitude of her employer." Dr. A advised Mrs. BB not to return to the same job.

On October 21, 1982, Dr. D wrote to Mrs. BB's employer and indicated that Mrs. BB's claim for her layoffs in November 1981 and January 1982 was allowed for an aggravation of pre-existing allergies to dust and mould. Dr. D noted that Mrs. BB again laid off in August 1982 claiming an aggravation of her respiratory condition. Dr. D requested that Mrs. BB's environment be checked regarding the level of dust and ventilation systems.

The Director of the Occupational Health and Safety Resource Centre for the accident employer submitted a report dated October 7, 1982. His report revealed that an air sampling was carried out on

September 28, 1982 in the library area where periodicals were unpacked. The results showed that the concentration of dust over a six and a half hour period was .006 milligrams per cubic metre of air. It was noted that threshold limit value for nuisance particles is 10 milligrams per cubic metre of air. Dr. D was of the view that there seemed "no reason for aggravation of [Mrs. BB's] asthma by nuisance dust in her employment." Dr. D added that it is "a well-known factor that asthma bouts can be triggered or are triggered very frequently in stress situations."

Dr. F from the Occupational Health Branch, Ministry of Labour, submitted his report dated February 8, 1983, for a field visit that was done on July 29, 1982. Dr. F was of the opinion that:

> Although Time Weighted Average Exposure Criteria are unlikely to be exceeded, development of allergy or occupational asthma in a few susceptible individuals is theoretically possible....
>
> Should asthma have occurred in an individual, challenges by exposure to specific allergens may produce attacks even though airborne concentrations are far below those which would produce health effects in normal individuals. Non-specific irritants like cigarette smoke or nuisance dust, although present in low concentrations may also affect asthmatic individuals.

In part two of his report, Dr. F noted that it was possible that "such sensitive individuals as the claimant might suffer health effects from low level concentrations of nuisance dust and other workplace contaminants." In concluding his report, Dr. F commented that a health hazard was not expected for most workers under normal circumstances. He added that "dust is present inevitably in the library and other rooms, although guideline concentrations are not likely to be approached." Dr. F went on to say that operation of the photocopy machines, filing books and papers, and sorting mail might all be expected to generate small amounts of dust. He noted that there was no evidence to show that chemical exposure from photocopying toners caused Mrs. BB's asthma.

In March 1983, Dr. D reviewed Dr. F's report and commented that Mrs. BB continued to have breathing problems even after she had relocated away from the photocopying machine. Dr. D indicated that the carbon dioxide level around the photocopier was "quite satisfactory." She was of the opinion that Mrs. BB's claim for entitlement subsequent to August 1982 should be denied. A Claims Review Branch letter dated March 21, 1983 advised Mrs. BB that there was no relationship between her lost time commencing in August 1982 and her employment activities. She was also advised that any respiratory problems she was experiencing subsequent to March 1982 were not attributable to her work environment.

Dr. A wrote to the Board in May 1983. He was of the view that Mrs. BB "was never asymptomatic in the environment where Xerox copies

were present ... (and) a continuing bronchial hyperactivity to [the Xerox machine] chemical was a continuing factor at least partially responsible for her continuing disability."

Mrs. BB appealed the Claims Review Branch decision and an Appeals Adjudicator hearing was held in December 1983. Mrs. BB argued that, although she was not required to operate a Xerox machine when she returned to work in March 1982, the machine was located approximately three feet from where she worked. Mrs. BB's representative argued that she had not recovered completely from the effects of the initial disability.

A September 7, 1983 report from Dr. A was submitted to the Appeals Adjudicator in support of Mrs. BB's appeal. Dr. A reported that, following Mrs. BB's layoff from work in November 1981, she was examined on several occasions. By January 5, 1982, it was noted that she had no respiratory complaints. Following her return to work, Mrs. BB was examined on January 18, 1982 with complaints of eye and throat irritation, and an aching chest and coughing. In March 1982 when Dr. A examined her, he reported that she was being bothered by dust in the new area and that she had complaints of breathlessness. On August 17, 1982, Mrs. BB complained of shortness of breath although Dr. A reported that a chest examination was essentially normal. A stress ECG taken on September 1, 1983 was also normal. Dr. A concluded that, during the period that he attended Mrs. BB, she had symptoms of dyspnea (difficulty in breathing) related to her work, but examination and pulmonary function testing showed no marked abnormality. He felt that an emotional component was a factor in her asthma.

In his February 2, 1984 decision, the Appeals Adjudicator concluded that it had not been established that Mrs. BB's respiratory difficulties could be reasonably related or attributed to the work environment. Mrs. BB appealed further and following a hearing in June 1984, the Appeal Board noted and accepted Dr. A's comments in September 1983 that the examination findings were normal, and that an emotional component contributed to Mrs. BB's symptoms. In addition, the Appeal Board noted Dr. D's opinion that Mrs. BB's complaints subsequent to August 19, 1982 were on a functional basis. In its July 13, 1984 decision, the Appeal Board concluded that Mrs. BB had no further entitlement for her respiratory complaints.

Mrs. BB advised a member of my investigative staff that she returned to work, as a sales clerk with a new employer, in September 1984. She continued to work without any respiratory difficulties until July 1985 when she laid off for personal reasons not related to her work environment.

During the course of this Office's investigation, I notified the Board, pursuant to the provisions of section 19(3) of the Ombudsman Act, that it appeared that I might support Mrs. BB's objection and make a report and recommendation that might adversely affect the Board. I

reached the tentative conclusion pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable to conclude that subsequent to August 19, 1982, Mrs. BB had no further entitlement for her respiratory complaint. Dr. Robert Elgie and the accident employer were advised of my tentative conclusion and recommendation. The reasons for my tentative opinion were as follows:

1. In December 1981, Dr. C, Director of Pulmonary Services at an Ontario city hospital, reported that it was "highly probable" that Mrs. BB was suffering from mild asthma aggravated by her work environment.

2. Dr. D has indicated that the Board granted Mrs. BB entitlement to compensation benefits on the basis that she had experienced an aggravation of her pre-existing allergies to dust and mould.

3. Dr. F conducted an in-depth assessment of Mrs. BB's occupational exposure. He commented that dust was present "inevitably" in the library and other rooms and the operation of photocopy machines as well as sorting mail, et cetera, may all be expected to generate small amounts of dust.

4. Further, there is no indication from the dust testing conducted at the library whether the air was tested in the immediate area where Mrs. BB unpacked periodicals. It would seem reasonable that this activity would produce localized concentrations of dust that might not be accurately reflected from a more generalized test.

5. In this regard, it noted that Mrs. BB's subsequent working environment, where she was no longer working with and unpacking books, did not aggravate her asthma.

6. Dr. A expressed the opinion that Mrs. BB's breathing problems were "truly related" to her work environment and aggravated by the attitude of her employer.

7. The Appeal Board noted Dr. A's September 1983 report wherein Dr. A reported that his examination findings were normal and an emotional component contributed to Mrs. BB's symptoms. However, the Appeal Board made no comment, nor was there any further inquiry conducted, with respect to Dr. A's earlier report (October 1982). In that report, Dr. A indicated that Mrs. BB was treated for asthma, chest pain and an anxiety due to work stress. In addition, Dr. A commented that Mrs. BB's asthma was "aggravated by the attitude of her employer."

8. I have noted Dr. D's January 1984 comments (memo #75) wherein she has stated that Dr. F's report revealed no evidence that exposures from photocopying toners caused Mrs. BB's asthma. However, I have also noted that Dr. D failed to address all of Dr. F's comments which included Dr. F's opinion with respect to Mrs. BB's susceptibility to a dusty work environment.

I tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board should revoke its decision and grant Mrs. BB entitlement to further benefits subsequent to August 19, 1982 for her respiratory complaint as being related to her November 1981 compensable claim.

To date, neither the Board nor the accident employer have responded to my September 8, 1986 letter and I have not had cause to alter my views. Given the above documentation, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision was unreasonable. I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board should revoke its decision and grant Mrs. BB entitlement to further benefits subsequent to August 19, 1982 for her continuing respiratory complaint, as being related to her November 1981 compensable claim.

This recommendation was included in a report sent to the Chairman and to the Minister on January 6, 1987.

The Board had not formally responded to the report and recommendations by March 30, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 14

On April 2, 1985, we received a letter from Mr. E, advising that he was dissatisfied with an Appeal Board decision dated April 11, 1983. On May 27, 1985, Mr. E's contention was discussed with him in detail over the telephone and he contended that the Appeal Board decision was unreasonable to conclude that he had no entitlement for a back disability related to his compensable accident on November 17, 1980. The Appeal Board, in its decision, concluded that it had not been established that Mr. E's low back disability and lost time from work subsequent to July 31, 1981, were related to his compensable accident of November 17, 1980 and consequently denied entitlement for the back disability.

On June 4, 1985, the Honourable Lincoln M. Alexander, then Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intent to investigate Mr. E's objection to the Appeal Board's decision. Mr. Alexander was invited to make a statement of the Board's position. On June 20, 1985, a response was received from the Workers' Compensation Board Ombudsman Administrator, on behalf of Mr. Alexander, stating that the Board did not have a statement to make at that time.

This case was assigned to a member of my investigative staff, who thoroughly reviewed Mr. E's Workers' Compensation Board claim file supplied by the Board, considered the relevant legislation and Board policy in relation to the issue, and discussed Mr. E's contention with him in detail over the telephone.

While in the course of his employment as an iron worker for the accident employer, Mr. E fell and twisted his right knee when stepping back from a machine on November 17, 1980. On November 19, 1980, Mr. E's knee gave out while climbing out of a railroad car. His right knee disability was diagnosed as a tear of the medial meniscus by Dr. A, orthopaedic surgeon. Mr. E remained at his regular work until March 11, 1981, when he laid off to have the torn medial meniscus surgically repaired on March 12, 1981. He returned to work on June 15, 1981 and on July 31, 1981, he laid off work due to his back disability.

In a report of September 4, 1981, Dr. B, general practitioner, stated to the Workers' Compensation Board that Mr. E had lumbar disc disease, the symptoms of which condition had been exacerbated by the right knee problem.

At the time of the layoff in July of 1981, Mr. E claimed entitlement for the back disability with the Workers' Compensation Board and the Compensation Board conducted a field investigation in order to fully consider Mr. E's entitlement for this disability.

Mr. E advised the Workers' Compensation Board that he had experienced previous back problems approximately six years prior to this incident, but received physiotherapy for a short period and lost no time

from work. He experienced no further problems regarding his back subsequent to this. He also advised the Board that he experienced some left low back pain on December 8, 1980, when arising from a nap he had taken during his lunch break at work. He stated that when he returned to work on June 15, 1981, he developed a gradual onset of low back pain which constantly got worse, eventually forcing him to lay off on July 31, 1981. He felt that the added pressure placed on his back as a result of his limping, due to the right knee condition, and the period he was on crutches subsequent to his knee surgery, aggravated his low back condition and that this acute aggravation should therefore be compensated for by the Workers' Compensation Board.

On September 17, 1981, Dr. B was interviewed by the Workers' Compensation Board investigator and he stated that it was reasonable to accept that the right knee problem gave rise to added pressure being placed on the back, and resulted in an aggravated degenerative disc disease condition. Dr. B added that other patients developed similar types of disabilities when required to place more weight than usual on their back and confirmed that Mr. E was totally disabled as a result of his back disability.

Prior to rendering a decision on Mr. E's claim, the Review Branch referred the file to Dr. C, Workers' Compensation Board surgical consultant. Dr. C was advised that Mr. E claimed the right knee problem and the consequent shifting of body weight to the left side aggravated the left lower back problem, and that this contention was supported by Dr. B. The Review Branch asked Dr. C whether or not this was a reasonable medical proposition. In a response of November 18, 1981, Dr. C simply stated "no". Mr. E's claim was consequently denied by the Claims Review Branch.

In a report of July 27, 1982 addressed to the Workers' Compensation Board, Dr. A stated, in part:

> ... There is indeed a high probability that this gentleman sustained an aggravation to a pre-existing and asymptomatic pathological state to his lumbar spine at the time which he sustained the knee injury. As he explained the graduation of symptoms, it is entirely probable.
>
> The physiotherapy and crutch-walking would certainly put an increased strain on the lumbar spine and I would suspect that making a claim on the basis of aggravation may very well be justified....

In a report of that same date, addressed to Mr. E, Dr. A stated, in part: "I would suggest that aggravation of a pre-existing lesion is certainly a reasonable and justified grounds for claim and appeal...."

In the decision of April 11, 1983, the Appeal Board noted that Mr. E had prior non-compensable back trouble in 1975 and that he

experienced back pain at work on December 8, 1980. The Appeal Board also noted that upon recovery from the compensable knee surgery, Mr. E returned to his regular work on June 15, 1981, and that there was no further mention of a back problem until his layoff of July 31, 1981. The Appeal Board considered the diagnosis of lumbar disc disease and Dr. B's indication of early arthritic changes, and concluded that Mr. E did not have entitlement for a back disability as related to the right knee injury.

During the course of this Office's investigation, I reached the possible conclusion pursuant to section 22(1)(b) of the Ombudsman Act, that:

> The Appeal Board unreasonably denied entitlement for a back disability related to the compensable right knee disability sustained on November 17, 1980.

I notified the Board and the accident employer of this possible conclusion in a letter dated May 7, 1986, pursuant to the provisions of section 19(3) of the Ombudsman Act. In support of the tentative conclusion, my letter went on to state the following:

> ... In consideration of this complaint, I note that the Appeal Board seemed to focus on the fact that Mr. E had pre-existing degenerative disc disease in his lumbar spine and that he had prior problems with his back in 1975. The Appeal Board also indicates that, as Mr. E experienced pain when he was arising from a nap during a break at work on December 8, 1980, the back disability in July of 1981 was not related to employment.
>
> In view of Dr. A's opinion of July 27, 1982, it could be that the back pain experienced on December 8, 1980 was directly related to the right knee disability sustained on November 19, 1980.
>
> Other than Dr. C's non-explanatory "no", the Workers' Compensation Board did not seem to consider the aspect of acute aggravation of a pre-existing condition as supported by the orthopaedic surgeon and the complainant's family physician.
>
> The orthopaedic surgeon and the worker's family physician both support the contention that the extra stress placed on the back as a result of the right knee injury aggravated the pre-existing degenerative disc disease. While there is a conflict of medical opinion between the claimant's doctors and a Board doctor, it is clear that the consensus of medical opinion is in favour of the complainant. As the Workers' Compensation Board surgical consultant gave no reason for not accepting the medical opinion put forward by the general practitioner, it would seem, at this point, that the opinions of the independent treating physicians, that Mr. E suffered an acute aggravation of the degenerative disc disease, should be

accepted as they provided detailed explanations for their position.

... Given the consensus of medical opinion supporting Mr. E's contention, I am tentatively of the view that Mr. E's low back disability is directly related to his compensable right knee disability and that benefits for the low back disability should be awarded accordingly....

Based on the above-noted information, it was tentatively recommended, pursuant to section 22(3)(c) of the Ombudsman Act, that:

The Board should cancel its decision of April 11, 1983 and grant Mr. E entitlement for a low back disability as being related to the compensable right knee disability sustained on November 17, 1980, on the basis of an acute aggravation of pre-existing degenerative disc disease.

On July 7, 1986, a response to my letter of May 7, 1986 was received from the employer which stated in part:

... We must point out that between the date of initial injury on November 17, 1980 and, the surgery performed on March 12, 1981, some four (4) months elapsed during which Mr. E performed all phases of his regular work as an ironworker placing considerable physical demands on his right knee. During that time period and, including the aforementioned medical treatments and examinations, no mention is made of any back discomfort. Since a great deal of emphasis is now being placed on Mr. E's back disability as arising from added pressures to the back due to limping and altered "gait" while favouring his right knee condition, surely it is reasonable to expect complaints of this nature by Mr. E during the pre-surgical crisis period particularly, during the performance of his regular physical work activities during a four (4) month period. The question remains why this is not shown to be the case....

... since his return to work on June 15, 1981, Mr. E performed his regular work functions, continued to complain to his supervisors of right knee discomfort only and, visited our medical department at least twice weekly for treatment to his right knee only. Furthermore, Mr. E was seen at our company medical department on July 3, 1981 and July 22, 1981 which is relatively close to his layoff date of July 31, 1981 yet, no mention is made of back discomfort to the degree of eventual layoff.

We submit that, given the abundance of opportunity available to Mr. E to mention he was suffering from back problems at any time during the approximately eight (8) month period between initial injury in 1980 and his layoff July 31, 1981, we find it

> unreasonable to accept his statement to the W.C.B. that, when he returned to work on June 15, 1981, **he developed a gradual onset of low back pain which constantly got worse eventually forcing him to lay off....**

As the Workers' Compensation Board had not responded to my letter of May 7, 1986, after three months, I believed that a reasonable amount of time had passed for it to do so.

I carefully reviewed and considered the submission made by the employer and particularly its references made to the lack of complaint of back pain from the time Mr. E injured his knee in November of 1980 until the time he laid off with his back pain in July of 1981. The employer believed that this indicated that a relationship between the knee disability and the back disability was not established. In my view, an issue such as this should not turn on a lack of complaint made by the injured worker, but reliance should be placed on the opinions expressed by the attending physicians. This particular case deals with the medical question of whether Mr. E's compensable knee problems would cause an aggravation to his pre-existing degenerative disc disease. The two attending physicians addressed this question and responded in the affirmative. I had no hesitation in finding their medical opinions to be convincing as to the issue at hand and considered these opinions to be the determinative factor.

To reiterate, I was convinced that the available medical evidence established a relationship between Mr. E's low back disability, causing layoff in July of 1981, and the compensable injury sustained in November of 1980.

It was my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision dated April 11, 1983, was unreasonable in denying entitlement for a back disability related to the compensable right knee disability sustained on November 17, 1980.

I recommended, therefore, pursuant to section 22(3)(c) of the Ombudsman Act, that the Appeal Board decision of April 11, 1983, be cancelled and Mr. E be granted entitlement for a low back disability as being related to the compensable right knee disability sustained on November 17, 1980 on the basis of an acute aggravation of pre-existing degenerative disc disease.

This recommendation was included in a report sent to the Chairman and to the Minister on September 11, 1986.

The Board had not formally responded to the report and recommendations by March 27, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 15

Mr. FF wrote this Office on December 19, 1985, expressing his dissatisfaction with the decisions made in his claim with the Workers' Compensation Board.

A review of the information submitted revealed that the Appeal Board, in its decision dated January 17, 1985, had concluded that Mr. FF's chest strain on June 18, 1981 had not resulted in any ongoing organic abnormality and that his continuing complaints were not supported by clinical findings. The Appeal Board therefore concluded that he was not entitled to lost time benefits in the period from May 6 to June 6, 1983. Additional medical reports were submitted to the Board and Mr. FF made application for reconsideration; however, in a further decision dated November 19, 1985, the Appeal Board concluded that no evidence had been presented which would cause the Board to vary, amend or revoke its decision of January 17, 1985, or grant a new hearing.

Mr. FF's file was assigned to a member of my investigative staff. The investigator wrote the Chairman of the Workers' Compensation Board on February 3, 1986, to inform the Board of our intent to investigate Mr. FF's contentions. This notification was acknowledged by the Board in a reply dated February 10, 1986, and subsequently we were provided with a complete photocopy of Mr. FF's disability claims. A review was then made of all the information available to the Appeal Board at the time of its decisions, and the information respecting Mr. FF's employment activities and continuing chest symptomatology was discussed with him in telephone conversations with my investigator.

During the investigation, I notified the Board, pursuant to the provisions of section 19(3) of the Ombudsman Act, that it appeared that I might support Mr. FF's objection and make a report and recommendation that might adversely affect the Board. My tentative position was set out in a letter to Dr. Robert G. Elgie, Chairman, Workers' Compensation Board, dated July 18, 1986. A similar letter was also sent to the accident employer to afford it an opportunity to make representations to me in this matter.

On the basis of the available information, I considered the following conclusion and recommendation.

Possible Conclusion:

The Appeal Board unreasonably concluded that Mr. FF's right chest wall strain did not result in any ongoing condition and that he was not entitled to benefits in the period from May to June of 1983. [Reference: Ombudsman Act, section 22(1)(b)]

Possible Recommendation:

The Board should revoke the Appeal Board decisions dated January 17, 1985 and November 19, 1985, and grant Mr. FF disability benefits for his intermittent days of lost time from work in the period from May 6 to June 6, 1983. Further, the Board should direct that the Claims Services Division consider any subsequent periods of disabling exacerbations of his chest pain, as arising out of employment, and direct that Mr. FF be examined for any permanently disabling condition. [Reference: Ombudsman Act, section 22(3)(g)]

This possible conclusion and recommendation were based on the following information.

Mr. FF first experienced right chest pain on August 26, 1980, while lifting a bucket of scrap during his employment as a machine operator. He received compensation benefits until returning to work on September 8, 1980. I note that in Mr. FF's last report to the Board following his return to work, he stated that he still experienced pain when performing heavy jobs.

On June 18, 1981, Mr. FF again experienced a right chest pain after lifting a load of metal bars at work. A strain of the right chest muscle was diagnosed by Dr. A and Mr. FF was unable to return to work until June 30, 1981.

On October 26, 1981 Mr. FF again reported a disabling pain about his right chest area and laid off work to seek his family physician's attention. In Dr. A's absence he was examined by Dr. B, who diagnosed a recurrent strain of the right pectoralis major muscle. Mr. FF received ongoing physiotherapy and was capable of returning to work on modified duties on November 16, 1981. The available information indicates Mr. FF returned to his regular employment duties on or about December 7, 1981 and following a decision made by an Appeals Adjudicator in May of 1982, Mr. FF was awarded temporary total and temporary partial benefits for his disabling compensable condition and layoff of October 26, 1981.

In May of 1983, Mr. FF's employer informed the Board that he had again sought medical attention for a recurrent chest pain. The evidence available suggested Mr. FF worked intermittently in the period from May 6 to June 6, 1983, depending on the availability of modified work at his place of employment. Examinations carried out by Dr. A and Dr. C revealed tenderness about the right pectoralis major muscle along the right lateral chest and right anterior chest. Again, a strain of the right pectoralis major muscle was diagnosed and physiotherapy was recommended. When examined by Dr. C on May 25, 1983, Mr. FF stated that the onset of pain had occurred approximately three to four weeks earlier when doing some required lifting at work. It was also his opinion that his work in general aggravated his chest discomfort.

In May of 1983 a field investigation was carried out by the Board and statements were obtained from Mr. FF, his employer and co-workers. Mr. FF stated that he had performed his regular work since December of 1981, although from time to time he experienced occasional chest pain and discomfort. He confirmed that he did not specifically seek medical attention in the period between his disabling exacerbations; nevertheless, he had experienced a persistent chest discomfort. He could not recall having suffered any specific accident prior to the disabling exacerbation of his chest pain in May of 1983. The plant nurse confirmed the intermittent periods of lost time Mr. FF had incurred subsequent to May 6, 1983. The employer's records also revealed that in the two weeks prior to Mr. FF's exacerbation of pain, he had worked 44 hours of overtime. The supervisor confirmed that Mr. FF had made complaints of chest pain occasionally but he could not recall the frequency of such complaints. A co-worker acknowledged being made aware by Mr. FF that he had some sort of muscular problem, but was not specifically aware if it was a problem in his chest. The co-worker did recall Mr. FF making complaints of chest pain just prior to his layoff in May of 1983. Dr. A's records revealed Mr. FF had been examined on May 3, 1983 for complaints of a right-sided muscular chest pain. He was advised to remain off work, and analgesics and therapy were prescribed. He was reexamined on May 10, 1983 for similar complaints and referred to Dr. C, whose findings have been mentioned above.

An orthopaedic examination was carried out by Dr. D on June 16, 1983. He recorded Mr. FF's statement that following his injury in June of 1981, his condition had never fully cleared up and that he found lifting seemed to aggravate his chest condition. Mr. FF expressed some concern to the doctor that the type of work he performed might be causing further damage. On the basis of his examination, Dr. D was of the opinion that Mr. FF's symptoms were muscular in nature; however, he reassured Mr. FF that there was nothing seriously wrong. A program of regular home exercises was recommended to strengthen the pectoralis major muscles.

The Claims Review Branch, in a letter dated July 11, 1983, and the Appeals Adjudicator, in a decision dated November 18, 1983, denied Mr. FF's claim for further benefits. Both decisions stated that there was a total lack of medical attention in the period from 1981 to 1983 and that during that time, Mr. FF had been able to perform his regular employment as well as overtime.

When appearing before the Appeals Adjudicator, Mr. FF stated that periodically and intermittently in the period from 1981 to 1983, he had continued to experience a discomfort in his right chest which appeared to be related to occasional additional exertion at work. This discomfort would persist for about one week and then appeared to resolve on its own accord. Since the discomfort always appeared to resolve itself, Mr. FF did not believe treatment from a physician would be helpful. In fact, the only treatment recommended was home exercises and hot showers. He therefore did not seek any regular medical attention

from either his family physician or the company nurse. Mr. FF also stated that he was concerned that additional lost time from work might jeopardize his employment and he could ill afford to be unemployed and looking for work while raising a young family. Mr. FF also stated that if requested to perform overtime work by his employer, he would, despite his discomfort, so as to earn extra funds.

On May 14, 1984 Mr. FF was examined by Dr. E, an orthopaedic surgeon. Dr. A had referred Mr. FF to Dr. E because of his persistent complaints of chest pain. In his report to Dr. A, Dr. E expressed the opinion that Mr. FF's symptoms were related to a muscular injury with repeated recurrences from stress at work. In part, Dr. E stated, "I do not believe that he has a serious condition but there is no doubt that his job is exacerbating each of these attacks." Home remedies, such as hot showers, were again recommended.

When the matter of additional entitlement was heard by the Appeal Board in November of 1984, a review of the claim file documentation was carried out by Dr. G, a Board staff surgical consultant. In his remarks to file dated November 30, 1984, Dr. G expressed the opinion that neither of Mr. FF's injuries in 1980 or 1981 had resulted in any specific organic damage. Dr. G reached this decision on the basis that there was no evidence of bruising or discolouration at the time of either injury and that Mr. FF had recovered sufficiently to return to work in a short period of time. Both injuries were considered to be soft tissues strains from which Dr. G felt Mr. FF had recovered. In Dr. G's opinion, Mr. FF's ongoing minor chest complaints were not based on any organic abnormalities or abnormal findings and not related to either the 1980 or 1981 compensable incidents.

The Appeal Board, in its decision dated January 17, 1985, stated that it accepted the medical opinion of the Board's surgical consultant and concluded that the compensable soft tissue strains to Mr. FF's right chest wall did not result in any ongoing organic abnormality and his ongoing complaints were not supported by any clinical findings. Benefits for the period of lost time from work between May and June of 1983 were therefore denied.

In May of 1985, Mr. FF's representative presented the Appeal Board with two additional medical reports and requested an application for reconsideration. The application was based on a report dated April 23, 1985, reflecting orthopaedist Dr. H's opinion and a report of a chiropractic clinic, dated April 30, 1985, authored by Dr. J, D.C.

The chiropractor's report indicated Mr. FF was first examined on November 22, 1984 for complaints of right-sided anterior chest pain of about two weeks' duration. The chiropractor also referred to a restriction in the range of movement in the neck and shoulder and found tenderness on palpation of the pectoralis major muscle. Twenty-one treatments were provided following the initial examination, which resulted in some reduction of pain; however, the pain would recur on exertion and as such, a referral was made to Dr. H.

In Dr. H's report of April 23, 1985, he stated that on examination, Mr. FF was relatively asymptomatic; however, the doctor expressed the opinion that Mr. FF's "recurring muscular problems are in all likelihood, a direct result of his original injury...." Dr. H was of the opinion that Mr. FF had "probably had a muscle tear that has healed with some fibrosis and he has had recurrent tears since then." A lighter job was considered to be more appropriate, if available.

Both practitioners felt that Mr. FF was an honest, straightforward individual without malingering tendencies who did not embellish his symptoms.

These additional medical reports were referred to Dr. G, who stated that he found no reason to change his opinion in this claim. He noted Dr. H's examination revealed no abnormalities and Dr. G again commented that no haematomas were ever identified when Mr. FF was originally injured.

After reviewing Dr. G's remarks, Mr. FF's representative requested a review by the Board's Director of the Medical Services Branch. The file was subsequently referred to Dr. K, whose remarks of October 4, 1985 were that he could not support a relationship to the earlier injury. Dr. K also remarked, "if it is the contention of the [injured worker], as proposed by Dr. H, that there have been further 'incidents' at work, then I would suggest that these be documented as formal recurrences, or new accidents."

In a decision dated November 19, 1985, the Appeal Board concluded that no evidence had been presented to cause it to vary, amend or revoke its decision of January 17, 1985, or to grant a new hearing. The Appeal Board noted and accepted the opinions of the surgical consultant and Medical Director and denied any relationship between the 1983 lost time from work and the compensable injuries. Accordingly, the Appeal Board denied Mr. FF's application for reconsideration.

The available information contained on the Board's claim file was discussed with Mr. FF. In a telephone conversation with my investigator, Mr. FF confirmed that he did not seek medical attention from his family physician between the end of 1981 and May of 1983. Mr. FF stated that the doctor was unable to resolve his ongoing discomfort and had suggested only home remedies such as hot showers and exercise. Although in some discomfort, Mr. FF stated that he was generally able to cope with his job and would only experience exacerbations in his chest pain with heavy lifting and overexertion. This commonly occurred during periods of overtime or when required to assist co-workers in changing the heavy dies of the bench press machines. Mr. FF stated that he had never been totally asymptomatic since his work-related chest strains, but had been able to continue until the exacerbation of his chest pain just prior to his layoff in May of 1983. Although he could not recall any specific accident occurring prior to his layoff in 1983 which may have accounted for an increase in his

chest pain, he did confirm that at that time he performed a considerable amount of overtime, at his employer's request, and that it was not unusual during these periods of increased work hours and exertion that he generally suffered more disabling chest pain. Mr. FF believed he had also lost one or two additional weeks of employment since 1983 for similar exacerbations of his chest pain and expressed the opinion that the general duties of his employment as a bench press operator aggravated his chest condition.

In my letter to the Board and accident employer, I summarized the tentative findings of the investigation and my observations as follows.

Having carefully considered the available information respecting Mr. FF's contention, I was of the tentative opinion that he was disabled from working in the period from May to June of 1983, due to a work-related chest condition. Although Mr. FF was capable of returning to work shortly after his chest strain on June 18, 1981, the evidence clearly supported that he had a continuing problem and suffered a further disabling exacerbation in October of 1981. He received ongoing therapy and performed only modified employment until approximately December of 1981. On the basis of his ability to perform his regular employment, albeit with some discomfort, and the lack of a complete resolution to his condition following medical treatment, Mr. FF chose not to seek regular ongoing medical attention. He also followed the advice of his physician and applied simple home remedies. Although the documentation did not establish his seeking medical attention from December 1981 to May 1983, nevertheless, the statements of his co-worker and supervisor did provide some support as to his having made continuing complaints of chest pain and I did not feel that Mr. FF should be penalized for having continued in his employment despite his discomfort.

In addition, it appeared to me that the extreme number of hours worked overtime in the immediate two-week period prior to his disabling exacerbation of pain in May of 1983 could be considered a significant contributing factor in this case. The increase in his hours of employment would serve to increase his stress and exertion and could account for the disabling exacerbation of his chest pain at that time. Understandably, Mr. FF did not associate his increased hours as a specific incident causing the onset of his disablement.

As well, all examining physicians had expressed the opinion that Mr. FF suffered a right pectoralis muscle strain, and that the ongoing nature of his employment served only to exacerbate his condition. The opinion expressed by all orthopaedists was that the original chest strain was the source of his symptoms with the work performed subsequently being an aggravating factor.

The examining physicians also expressed the opinion that Mr. FF was an honest, straightforward individual without malingering tendencies and I was of the tentative view that the information on file served only

to substantiate those opinions. Mr. FF had always made every effort to continue his employment despite his persistent right chest symptoms. It seemed unfair that he should be penalized for displaying a strong work ethic and willingness to continue with his employment, even while experiencing chest discomfort.

In response to the tentative conclusion and recommendation outlined in my letter of July 18, 1986, Ms. L, Personnel Manager for the accident employer, wrote this Office on August 21, 1986. With respect to Mr. FF's layoff and treatment subsequent to October 26, 1981, Ms. L stated that a notation made on the employer's file by the previous industrial health nurse, following her phone call to the hospital physiotherapy clinic, revealed that Mr. FF did not report for all of his scheduled appointments and on most occasions was late. Regarding Mr. FF's employment in the period from May 6 to June 6, 1983, Ms. L stated that the employer's records indicated that modified work was consistently available; however, Mr. FF himself reported for work on an intermittent basis and, on at least one occasion, had been unable to work for personal family reasons. With respect to his performing overtime, Ms. L stated that overtime was not mandatory and an employee would not be expected to perform overtime if, as a result, the additional exertion would contribute to a disabling condition. It was noted that Mr. FF had not advised his employer that overtime could contribute to any increase in his chest pain. Ms. L was skeptical about the examining physicians' being in a position to assess the malingering tendencies of a patient, particularly on the basis of only one examination. She also wished to point out that although Mr. FF had visited one orthopaedist in June of 1983, when a subsequent examination by a specialist was necessitated in 1985, Mr. FF had chosen a different physician. In summary, Ms. L stated that in her view, the Workers' Compensation Board had conducted a fair and thorough investigation and that the decision to deny Mr. FF's claim was not unreasonable.

I have reviewed and considered the remarks made by Ms. L, on the employer's behalf. The evidence on file reveals that Mr. FF reported his layoff on October 26, 1981 to his employer, sought and received medical attention for his chest strain, and returned to modified employment on or about November 16, 1981. The Workers' Compensation Board has already awarded both lost time benefits and wage loss benefits, when performing modified work, in the period from October 26 to December 7, 1981. The layoff at that time was due to an exacerbation of his chest pain following the accident in June of 1981. Mr. FF has been compensated by the Board for that period, and it is not in dispute.

Regarding the availability of modified work in the period from May to June 1983, I note that the previous information presented to the Board by the employer's representative (Workers' Compensation Board field investigation notes, June 1, 1983) differs somewhat from Ms. L's remarks. At that time, the plant nurse stated that Mr. FF had returned to light work on May 9th and 10th, but was off work thereafter as "the employer could not provide any further light duty work." Mr. FF again

returned to light work on May 18th, although continuing to complain of chest pain, and by May 25th, felt he was unable to perform the alternate duties due to his symptoms. The plant nurse expressed her dissatisfaction with Mr. FF's attitude about work and the fact that his doctor had given him authority to be off work, even though there was light work available. It would therefore seem Mr. FF was following his physician's advice, as would be appropriate.

In reference to Mr. FF having been first examined by Dr. D in June of 1983, and by Dr. H in April of 1985, the available information confirms that both orthopaedic examinations were arranged by his general practitioners at the time. As such, the inference that Mr. FF was perhaps shopping for a favourable opinion is, in my view, unfounded.

The remarks made by the employer have been considered and have not persuaded me to change my view of this case. Further, at the time of the issuance of this report, the Workers' Compensation Board had not replied to my letter of July 18, 1986.

Since the Board has had sufficient time to respond and as I have not had cause to alter my views, having regard for the findings disclosed by the investigation it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decisions of January 17, 1985 and November 19, 1985, were unreasonable in concluding Mr. FF was not entitled to further benefits for a continuing compensable chest condition.

It is therefore my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Board should revoke its decisions and grant Mr. FF disability benefits for his intermittent days of lost time from work in the period from May 6 to June 6, 1983. Further, the Board should direct that the Claims Services Division consider any subsequent periods of disabling exacerbations due to his chest pain, arising out of employment, and direct that Mr. FF be examined for any permanent disabling condition.

This recommendation was included in a report sent to the Chairman and to the Minister on December 9, 1986.

In a response dated March 13, 1987, the Board stated that it was unable to accept the Ombudsman's recommendation. The substance of the Board's reply read as follows:

. . . .

> In the Committee's opinion, we do not have a medical consensus regarding the causal agent for Mr. FF's continuing chest problem.
>
> In the opinion of the Board's Surgical Consultant, the original incident is resolved and the worker's chest complaints are not

based on any organic abnormality or abnormal findings. This same opinion was also supported by the then Director of Medical Services.

Attention has also been paid to Dr. E's report of May 14, 1984 which states in part:

> This man's symptoms are related to a muscular injury over the right side of his chest with repeated recurrences from stress of his work. I do not believe that he has a serious condition but there is no doubt that his job is exacerbating each of these attacks.
>
> I do not think this will result in a permanent disability but he may be prone to further episodes of chest pain periodically.

On the basis of Dr. E's report, one could argue that Mr. FF may have a valid claim for recurring disability. On the other hand, the Board's Surgical Consultant who has considerable practical experience with injuries of this type expressed the opinion that "... any muscle fatigue strain should not last more than a maximum of 6 weeks."

As Mr. FF denies any new accidents (Note Claims Investigator's report of June 1, 1983), and disassociates his increased hours as contributing to his disablement, it is extremely difficult to identify and/or understand what is contributing to recurrences.

Although not without empathy to the problem, the Committee is unable to relate the worker's complaints to either incident in 1980 or 1981.

. . . .

After reviewing the Board's response, the Ombudsman was not persuaded to change his view in Mr. FF's case. Although meetings were subsequently held in an attempt to clarify the Board's and the Ombudsman's positions, the matter was not resolved.

Accordingly, the Ombudsman referred this matter to the Premier pursuant to the provisions of section 22(4) and (5) of the Ombudsman Act. The results of his findings were reported to the worker. The Board was also advised of the Ombudsman's decision to refer the matter to the Premier. The file was then closed.

DETAILED SUMMARY NO. 16

In January of 1985, a staff member of an advocacy group for injured workers wrote this Office on Mr. GG's behalf, to bring to our attention his objection to a decision of the Appeal Board of the Workers' Compensation Board dated June 8, 1984. Mr. GG contended that the Appeal Board was unreasonable to have concluded that he was not entitled to an increase in the weekly rate of temporary disability benefits awarded to him subsequent to his compensable recurrence on September 9, 1980.

Mr. GG's file was assigned to a member of my investigative staff. Following a preliminary review of the Appeal Board's decision, correspondence was carried out with the Board in an effort to clarify the earnings basis used to award Mr. GG compensation benefits and the manner in which the Board had calculated the compensation rate payable. Although the Board's replies helped to clarify its position, it failed to resolve Mr. GG's concerns and as such, by letter dated June 10, 1985, the Chairman of the Workers' Compensation Board was notified of this Office's intent to investigate Mr. GG's contention.

During the investigation I notified the Board, pursuant to the provisions of section 19(3) of the Ombudsman Act, that it appeared that I might support Mr. GG's objection and make a report and recommendation that may adversely affect the Board. This tentative position was set out in my letter dated December 12, 1985. A similar letter was not sent to the accident employer as the available information indicated that it was no longer in business.

On the basis of the available information, I considered the following conclusion and recommendation:

Possible Conclusion:

The Appeal Board was wrong in finding Mr. GG's compensation rate had been calculated in accordance with the provisions of the Workers' Compensation Act and therefore it was not possible to adjust his rate subsequent to September 9, 1980. [Reference: Ombudsman Act, section 22(1)(d)]

Possible Recommendation:

The Appeal Board should revoke its decision and direct that Mr. GG's weekly rate of compensation benefits be adjusted from $216.35 to $249.23, effective September 9, 1980. Further, the practice on which the original decision was based should be altered, so that every injured worker is afforded the intent of section 40 [now section 43(7)] of the Workers' Compensation Act. [Reference: Ombudsman Act, sections 22(3)(g) and (d)]

This possible conclusion and recommendation were based on the following information.

On October 5, 1976, while employed as a general labourer, Mr. GG suffered a disabling back strain while lifting a piece of concrete. A claim for disability was established and his pre-accident average weekly earnings were determined by the Board to be $332.31. In accordance with section 39 of the Workers' Compensation Act, Mr. GG was entitled to receive 75% of his average weekly earnings. This would have produced a weekly compensation rate payable of $249.23; however, in accordance with the provisions of the Workers' Compensation Act at the time of his accident, he was not entitled to receive benefits in excess of the statutory maximum of $15,000 per annum/$216.35 per week. Therefore, Mr. GG was entitled to and received compensation benefits at the weekly rate of $216.35 following his accident on October 5, 1976.

Mr. GG received temporary total disability benefits until February of 1978, at which time he was awarded a 10% pension for his residual low back disability. A review of the Board claim file documentation has revealed that he was also awarded various other periods of temporary benefits with respect to his 1976 back injury and also with respect to another injury which occurred on February 22, 1979.

In September of 1980, Mr. GG reported to the Board that he had again laid off work due to an exacerbation of his compensable back condition. That recurrence was accepted by the Board and temporary total disability benefits were restored in Mr. GG's claim effective September 9, 1980. In order to ascertain his earnings prior to his layoff, the Claims Adjudication Branch contacted his employer. The information obtained revealed Mr. GG had commenced employment on September 2, 1980 and was being remunerated at the weekly rate of $195.75.

Since Mr. GG had become entitled to further benefits for a compensable disability following a return to work, the provisions of section 40 of the Workers' Compensation Act were considered. This section of the legislation reads as follows:

> Where an employee, who has become entitled to benefits under this Act and has returned to employment, becomes entitled to payment for temporary disability by reason of any matter arising out of the original accident, the compensation payable for such temporary disability shall be paid on either the average weekly earnings at the date of the accident or the average weekly earnings at the date of recurrence of the disability, calculated in the manner set out in section 39, whichever is the greater.

In applying this section to Mr. GG's claim, the Board determined that the average weekly earnings at the date of his 1976 accident ($332.31) were greater than the average weekly earnings at the date of the 1980 recurrence in his disability ($195.75). Having reached

this conclusion, the Board proceeded to award Mr. GG weekly compensation benefits, subsequent to September 9, 1980, at the rate of $216.35 - the statutory weekly maximum which had been in effect at the time of his original accident. The decision to do so was subsequently confirmed by the Claims Review Branch, in a letter dated February 1, 1982, and by the Appeal Board, in its decision dated June 8, 1984. The Appeal Board concluded that the compensation rate had been calculated in accordance with the provisions of the Act and that Mr. GG had received the maximum rate possible.

In my 19(3) letter to the Board, I summarized the findings of the investigation and my observations as follows.

When the Board calculated the compensation rate payable to Mr. GG in 1980, on the basis of applying section 40, nothing in the legislation precluded the Board from awarding him a weekly rate of $249.43 (75% of $332.31). There are no qualifiers in either section 40 or 39 of the Workers' Compensation Act which would limit the rate payable, at the time of a recurrence, to the statutory maximum in effect when the original accident occurred. Clearly, if there were such a limitation, it would serve to undermine the intent of section 40 and no injured worker would receive any benefit from the application of this section of the legislation.

Further, the Board did not appear to be consistent in its application of section 40. A worker whose earnings were found to be greater at the time of a compensable recurrence than at the time of the original accident was not limited to the statutory maximum in effect at the time of his/her accident. Rather, the only limitation imposed was that the weekly benefits awarded cannot exceed the statutory maximum in effect at the time of the recurrence or payment of benefits. In Mr. GG's case, he would not have exceeded the weekly rate of $266.82, which was in effect at the time of his recurrence in 1980. I could not appreciate the Board having taken the position that weekly benefits to a maximum of $266.82 would only apply if the accident occurred on or after July 1, 1980, since I was aware that a worker whose earnings were found to be greater at the time of a recurrence would indeed receive weekly benefits (providing the earnings information warranted it) to the maximum rate in effect at the time of the recurrence. In other words, the worker would not be limited to the earnings ceiling at the time of his/her original accident.

In my opinion, section 40 authorized the Board to take the greater of two figures when calculating a compensation rate payable for a recurrence: either the average weekly earnings at the time of the accident, or the average weekly earnings at the time of the recurrence. The language is unambiguous. In Mr. GG's case, this figure would be $332.32 and in accordance with section 39, would produce a compensation rate payable of $249.23. No reference is made in section 40 which would suggest that benefits paid at the time of a recurrence should be limited to the rate payable in a prior year. The use of the wording "average

earnings" in section 40 is subject to the statutory rate under section 45 and at the time of Mr. GG's recurrence, weekly benefits could not exceed $266.82 per week.

Since I have not to date received a response from the Workers' Compensation Board and since a reasonable length of time by which the Board may have replied, in my view, has elapsed, I find my views of Mr. GG's case have not changed. Therefore, it is my opinion pursuant to section 22(1)(d) of the Ombudsman Act, that the Appeal Board was wrong to have concluded that it was not possible to adjust the compensation rate paid to Mr. GG subsequent to September 9, 1980.

I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Board revoke its decision of June 8, 1984, and direct that Mr. GG be paid compensation benefits at the higher weekly rate of $249.23, for the period of disablement beyond September 9, 1980. Further, and pursuant to section 22(3)(d) of the Ombudsman Act, the practice on which the original decision was based should be altered, so that every injured worker is afforded the intent of section 40 [now section 43(7)] of the Workers' Compensation Act.

This recommendation was included in a report sent to the Chairman and to the Minister on May 27, 1986.

The Board had not formally responded to the report and recommendations by March 31, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 17

On September 20, 1984, Mrs. H advised our Office by telephone that she was dissatisfied with an Appeal Board decision dated August 30, 1984. During an interview of September 24, 1984, her contention was discussed with her in detail and she contended that the Appeal Board decision was unreasonable to conclude: that her late husband's 25% permanent partial disability award was adequate recognition of his compensable chest disability, that this award was not entitled to be granted prior to 1976, and that she was not entitled to dependency benefits as a result of her husband's compensable chest disability, pursuant to section 36 of the Workers' Compensation Act.

On September 28, 1984, the Honourable Lincoln M. Alexander, then Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intent to investigate Mrs. H's objections to the Appeal Board's decision. Mr. Alexander was invited to make a statement of the Board's position. On October 12, 1984, a response was received from the Assistant Secretary of the Board, on behalf of Mr. Alexander, stating that the Board did not have a statement to make at that time.

The case was assigned to a member of my investigative staff who thoroughly reviewed Mr. H's Workers' Compensation Board claim file supplied by the Board, considered the relevant legislation and Board policy in relation to the issues, and discussed Mrs. H's contention with her in detail.

While in the course of his employment with the accident employer during the period of October, 1950 to September, 1976, Mr. H suffered exposure to sulphur dioxide gas which resulted in a compensable lung disability. In November of 1982, Mr. H's union representative wrote to the Workers' Compensation Board making the initial claim for the lung disability and a claim was instituted and information was requested from Mr. H, his doctor and the employer in December of 1982.

On January 27, 1983, Mr. H's union representative advised the Workers' Compensation Board that Mr. H had passed away on January 9, 1983 and that the worker's widow, Mrs. H, wished to claim dependency benefits as a result of her husband's death. In March of 1983, entitlement was granted by the Board for Mr. H's lung condition as being the result of his contact with sulphur dioxide and a 25% permanent partial disability award was processed, dating from January 1, 1976. Mr. H had not worked since June 5, 1976 and officially took early service retirement pension as of September 1976 after 25 years, ten and one-half months of service.

The 25% permanent partial disability award granted from January 1, 1976 was based on a review of the available medical information by Dr. D, general practitioner and Workers' Compensation Board Chest Disease Consultant. Basically, it was Dr. D's opinion that

an average award from 1976 to the time of Mr. H's death would translate into a 25% pension. Dr. D was also of the opinion that "... the death was largely cardiac..." and therefore did not medically accept the claim for dependency benefits.

Mrs. H's claim for increased benefits was denied by the Workers' Compensation Board and she appealed this denial to the Appeal Board. Prior to a hearing being arranged, a further opinion on the case was requested from Dr. D and on January 30, 1984, he gave the opinion that he felt Mr. H's death was related to established coronary artery disease and that the sulphur-dioxide-induced respiratory disease did not play a significant part in his death. Dr. D rejected a diagnosis of cor pulmonale as there was no electrocardiogram evidence of this.

In April of 1984 Dr. C, family physician, reported to the Workers' Compensation Board that it was his opinion that Mr. H died of cor pulmonale and he had been totally disabled since his retirement due to his compensable chronic obstructive pulmonary disease.

In the decision of August 30, 1984, the Appeal Board accepted the opinion of Dr. D that the chronic obstructive lung disease was related to Mr. H's employment and that he was considered to be 25% permanently partially disabled from 1976 to the date of his death. The Board also accepted the opinion of Dr. D that the evidence did not establish that Mr. H's death was due to his compensable disability and concluded that Mr. H was 25% permanently partially disabled as a result of his compensable chest disability from 1976 to the time of his death, and that the preponderance of evidence did not establish that Mr. H's death occurred as a result of his occupational chest disability.

During the course of our investigation, we obtained medical information from various hospitals that Mr. H had been treated at over the years, as well as further clarifying opinions from Dr. E, attending respirologist at the time of Mr. H's death, and Dr. C. Dr. E was of the opinion that "... the severe obstructive lung disease contributed at least equally to his final demise."

In a report of September 11, 1985, Dr. C stated, in part:

> ... He had symptoms of chronic bronchitis and asthma attacks for more than 10 years before his death and he had quit smoking 11 or 12 years ago prior to his death. He never had any heart problem, hypertension or chest pain prior to becoming my patient from July 1982....
>
> The patient was admitted to Hospital B on July 2, 1982, two weeks after he was discharged from Hospital A. The diagnosis was severe chronic obstructive pulmonary disease with a secondary chest infection. He spent most of his time in hospital until his death. At the end, the complications from the lung condition had induced heart failure and renal

> failure. Autopsy was not performed because we have no doubt of the medical diagnosis. All his ECGs never showed any evidence of old or new myocardial infarctions....

Hospital records were obtained from three other hospitals, covering periods of treatment from January to June of 1982, all indicating a diagnosis of chronic obstructive pulmonary disease.

A report of June 17, 1982 was obtained from Dr. F, cardiologist, which stated, in part: "... there clearly is nothing significantly wrong with the aortic valve and I think he has diffuse left ventricular disease secondary to coronary arteriosclerosis and possibly hypertension. His left ventricular dysfunction may also have been partly related to his chronic obstructive pulmonary disease...."

As this medical information was unavailable to the Board at the time of its decision, it was forwarded to Dr. Robert G. Elgie, Chairman of the Workers' Compensation Board, on December 4, 1985 noting that Drs. C and E indicated that Mr. H's death was directly related to his compensable chronic obstructive lung disease and that the hospital records related directly to Mr. H's degree of disability and history of his problems with this disability.

On March 10, 1986 a response was received from the Workers' Compensation Board indicating that the medical documentation submitted did not give the Board cause to alter, vary or amend the Appeal Board decision and this was based on further opinion completed by Dr. D on February 25, 1986. This opinion was enclosed with the Board's response and stated, in part:

> ... There is no doubt about him having at least a moderate degree of disability from his obstructive lung disease but as noted there was no consistent evidence of cor pulmonale and it was already pointed out that the lung function studies did show some reversibility as late as June 1982. The file contains some conflicting evidence about this worker's smoking habits but undoubtedly the cigarette habit as well as the sulphur dioxide contributed to the chest disease. The new material that has been submitted and reviewed offers no reason to change the previous opinion that this worker's death was primarily cardiac in nature and not due to the [sulphur dioxide] component of his obstructive lung disease....

On March 18, 1986, Dr. D's opinion was provided to Dr. E for his review and further opinion, and in a report received by our Office on May 15, 1986, Dr. E stated in part:

> ... As I have stated, I felt that Mr. H was largely dying a cardiac death but that I also felt he had fairly severe obstructive lung disease secondary to emphysema with also a bronchospastic component. I also thought that he probably had an element of cor pulmonale since he was grossly oedematous.

> I was not aware of the patient having had the studies in Hamilton. These studies did show fairly severe problems with left ventricular function.... The studies showed ... very poor left ventricular function. It is interesting that they also suggested some right ventricular enlargement.
>
> This new information does make it clear that this patient had pre-existing left ventricular dysfunction which was at least partly on the basis of coronary artery disease....
>
> The patient also had at least a moderately severe obstructive lung disease which I think puts additional strain, at least on the right side of the heart and would contribute somewhat to blood gas abnormalities if there was any interstitial oedema.
>
> I find it somewhat distasteful to be in disagreement with the Compensation Board as to the relative contributing causes of death in a patient. However, I think that with the new information from the Hamilton investigations, one has to state that the principal cause of death was left ventricular failure. I think the patient had severe disease in one system and significant disease in another system makes treatment more difficult and I think that this was the case in this patient.
>
> Without an autopsy it is impossible to state as to whether there was significant problems with cor pulmonale. However, I think that in this patient's case there was quite marked peripheral oedema without, initially, at least, any evidence of pulmonary oedema. This is more suggestive of an element of right-sided heart failure....
>
> I think it is my opinion that this patient died a cardiac death with predominant left ventricular dysfunction. Some of the clinical findings were also suggestive of an element of right ventricular dysfunction ... one would assume that this right ventricular dysfunction was due to his pulmonary problems.

This report of Dr. E's was submitted to the Workers' Compensation Board along with my letter of June 24, 1986 which outlined the possible conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, reached during the course of my investigation. This possible conclusion was noted as follows:

> The Appeal Board unreasonably concluded that the late Mr. H was 25% permanently partially disabled as a result of his compensable chest disability from 1976 to the time of his death, and that Mr. H's death did not occur as a result of his occupational chest disability. [Reference: Ombudsman Act, section 22(1)(b)]

My letter of June 24, 1986, was notification to the Board of my possible conclusion and recommendation, pursuant to the provisions of

section 19(3) of the Ombudsman Act, and a similar letter was also sent to the accident employer on this date. In support of the tentative conclusion, my letter went on to state the following:

> In consideration of the contention concerning the cause of death, I note that at the time of the Appeal Board decision there were two medical opinions on file indicating the cause of death. One was from the Workers' Compensation Board Chest Disease Consultant, Dr. D, general practitioner, who felt that the death was as a result of congestive heart failure connected with established coronary artery disease. The other opinion was from Dr. C, also a general practitioner, who felt that Mr. H died from cor pulmonale, congestive heart failure, and a severe chronic obstructive pulmonary disease. The Proof of Death Report completed by the Director of Medical Records, Hospital B, indicated the cause of death as congestive heart failure due to severe chronic obstructive pulmonary disease. Dr. D has indicated that, as there was evidence of left ventricular failure, this was indicative of heart disease and not cor pulmonale which would demonstrate right ventricular failure. Reviewing all of the available information it would appear that there is medical reporting of bi-ventricular failure and there is medical literature available which indicates the major symptoms and signs of cor pulmonale are also seen in left heart failure, and differentiation may be difficult. There is also some indication in the medical literature that physical examinations, x-rays and ECG results may be relatively insensitive indicators of right ventricular enlargement.
>
> Dr. E and Dr. C both indicated that Mr. H's compensable lung condition contributed to his death. Section 36 of the Workers' Compensation Act allows for entitlement to be granted "where death results from an injury to a worker...." A review of the relevant case law illustrates that Worker's Compensation legislation regarding a compensably related death is not so prohibitive as to require the compensable condition to be the sole cause of death. In fact, the case law demonstrates that to deny entitlement, it must be established that the death was due solely to a non-compensable condition. Therefore, entitlement would follow where it is shown that the compensable condition was contributory.
>
> As Dr. E is the only specialist involved, I am of the tentative opinion that the weight of the medical evidence supports a relationship between Mr. H's death and his compensable lung condition, and that dependency benefits should be accordingly awarded to his widow.
>
> In consideration of the contention concerning the retroactivity of Mr. H's 25% permanent partial disability award, while there

> is no clinical evidence available prior to 1976 to substantiate disability, the preponderance of medical reporting indicates that Mr. H's condition existed at least as far back as 1973 and with the benefit of doubt being afforded the worker, I am of the tentative opinion his award should date from 1973.
>
> In consideration of the contention concerning the level of Mr. H's disability benefits, it is clear that since at least January of 1982, Mr. H was hospitalized on a constant basis as a result of his compensable chest disability. Given the evidence on continued hospitalization subsequent to January 1982, I am tentatively of the view that Mr. H was more disabled during this period than his 25% award recognized and benefits should be increased accordingly....

Based on the above-noted information, it was tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that:

> The Appeal Board should cancel its decision of August 30, 1984 and grant:
>
> (1) An increase in the permanent partial disability award three months prior to January, 1982 when Mr. H began a series of hospitalizations until his death;
>
> (2) the permanent partial disability award from 1973, reflecting the medical opinions of a permanent disability prior to 1976;
>
> (3) dependency benefits on the basis that the occupational chest disability was a contributing factor in the late Mr. H's death.

On September 2, 1986, response to my letter of June 24, 1986 was received from the employer. The substance of the response was prepared by the employer's Medical Director, and stated, in part:

> ... There does not appear to be any new evidence submitted within the body of the letter that would make one believe that the patient died from his chronic obstructive lung disease. Indeed, the evidence in the letter supports the likely diagnosis of arteriosclerotic heart disease with resulting left ventricular failure and the cause of death was probably cardiac arrest....

As the Workers' Compensation Board had not responded to my letter of June 24, 1986 after three months, I believed that a reasonable amount of time had passed for it to do so.

I carefully reviewed and considered the submission made by the employer, particularly the comment concerning the likely diagnosis of

arteriosclerotic heart disease and the consequent cause of death being cardiac arrest. While cardiac arrest was medically considered to be a cause of death, I was not convinced that it was the sole cause of death in this case and I believed the available medical information from Dr. E and Dr. C indicated that the compensable lung condition was contributory to the death. I noted that my letter of June 24, 1986, indicated that the case law clearly demonstrated that the compensable condition need not be the sole cause of death. The intent and plain meaning of the Workers' Compensation Act allows entitlement to be granted where it is reasonable that the compensable condition was a contributing factor in the worker's demise, with the benefit of any doubt being given to the worker.

Concerning the level of Mr. H's award and the date that this became effective, I believed that the history of hospitalization for approximately one year prior to his death indicated a level of disability greater than that recognized by the 25% permanent partial disability award and that, with the extension of the benefit of doubt to the worker, the available medical reporting documenting the history of Mr. H's condition indicated a disability present prior to 1976.

I was convinced that the available medical information established a relationship between Mr. H's death and his compensable lung condition; further, the evidence also indicated a disability level in excess of that granted for a period prior to his death, as well as an existent disability prior to 1976.

Therefore, it was my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of August 30, 1984 was unreasonable to conclude that Mr. H was 25% permanently partially disabled as a result of his compensable chest disability from 1976 to the time of his death and that Mr. H's death did not occur as a result of his occupational chest disability.

I recommended, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board decision of August 30, 1984 be cancelled and that: an increase in the permanent partial disability award be granted, three months prior to January, 1982 when Mr. H began a series of hospitalizations until his death; a permanent partial disability award be granted from 1973 reflecting the medical opinions of a permanent disability prior to 1976; and the Board grant the worker's widow dependency benefits on the basis that the occupational chest disability was a contributing factor in the late Mr. H's death.

This recommendation was included in a report sent to the Chairman and to the Minister on October 8, 1986.

The Board had not formally responded to the report and recommendations by March 27, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 18

Mr. S was interviewed at this Office on March 13, 1985. At that time he indicated his dissatisfaction with an Appeal Board decision of February 20, 1985, in which he was denied entitlement for occupationally-induced, bilateral, sensori-neural hearing loss and tinnitus.

On April 1, 1985, Mr. Lincoln Alexander, then Chairman of the Workers' Compensation Board, was notified of our intent to investigate Mr. S's contention. In its reply of April 19, 1985, the Board indicated it had no further statement to make at that time. Mr. S's file was assigned to Ms. Martha Keil of my Office, who conducted a review of the Workers' Compensation Board claim file supplied by the Board and discussed Mr. S's case with him on several occasions. She also requested and received from Dr. A, otolaryngologist, an opinion concerning the causation of Mr. S's hearing loss.

Mr. S has worked as a switchman and yardman for the accident employer since October of 1953. In July of 1980 he saw otolaryngologist, Dr. A, as he was experiencing hearing loss and tinnitus. Dr. A indicated that the worker was exposed to very loud noise at work and felt that the noise exposure there was the main factor in his problem. At that time Mr. S did not file a claim with the Workers' Compensation Board.

In October of 1980 a claim was filed with the Board by his family physician, Dr. B, who noted in his report that there had been a gradual hearing loss over the past six years, worse in the left ear.

In April of 1981 the Board requested that the Ontario Ministry of Labour conduct a sound survey at Mr. S's workplace. This information was communicated to Mr. S. In May of 1981, Mr. S again saw Dr. A; audiological testing revealed a hearing loss of 20 decibels in the right ear and 60 decibels in the left.

Only in March of 1982 did Mr. C, Consultant from the Occupational Health Branch of the Ministry of Labour, visit the worksite to assess the noise levels to which Mr. S would be exposed. In his report he stated that it was generally agreed by both the worker and employer representatives that the present-day diesel engines were somewhat less noisy than the older models. Mr. C found that the worker's exposure to noise was within the presently accepted criteria for hearing conservation with the equivalent continuous noise level being 84 decibels.

Consequently, the Claims Review Branch, in its decision of April 15, 1982, denied Mr. S's claim as the level of noise to which he was exposed did not exceed 90 decibels for an eight-hour work day in accordance with the Ontario regulations prescribing noise limits at the workplace.

Mr. S saw Dr. A once again in July of 1982, at which time his hearing loss was found to be 25 decibels in the right ear and 60 in the left.

At his Appeals Adjudicator hearing in September of 1982, Mr. S maintained that he had been exposed to noise well above that revealed by the testing carried out by Mr. C. It was pointed out that the sound level testing was carried out on the engine series #1300 whereas Mr. S had spent most of his work history around the #7000 and 8000 series of engines. Following the hearing, arrangements were made for further sound surveys to be carried out on diesel engines.

Mr. C carried out these tests in November of 1982 on the #7000, 7100 and 7200 series engines. Once again he found that the noise levels were within the presently accepted criteria for hearing conservation; nevertheless, he did not relate what the continuous level would be in this report.

In his decision of January 20, 1983, the Appeals Adjudicator denied Mr. S's claim as it had not been established that he was exposed to sufficiently high noise to account for his hearing loss.

Mr. S underwent audiological testing at a hospital hearing centre in March of 1983 which confirmed that his right-sided hearing loss was 25 decibels and his left-sided hearing loss was 60 decibels.

At the Appeal Board hearing in September of 1983, Mr. S claimed entitlement for hearing loss and tinnitus as a result of noise at the workplace. His representative argued that the Appeals Adjudicator decision was based on incomplete evidence as there had been no noise level tests conducted on the #8000 series engines. The representative further argued that Mr. S's otolaryngologist, Dr. A, had related the hearing loss to his work environment and that this medical evidence should be accepted.

Following the hearing, the Appeal Board directed that an attempt to be made to obtain noise level testing of the series #8000 engines. This process took well over a year as the accident employer stated that the only #8000 engines available were in Montreal. Finally, a previous noise level survey on the series #8000 engines was located. This report was based on testing carried out in October of 1980 which recorded that noise levels on the series #8000 locomotives were not in excess of the criteria outlined in the regulations for the Occupational Health and Safety Act. Again, there was no continuous noise level given.

In its decision of February 20, 1985, the Appeal Board concluded that it had not been established that Mr. S was exposed to hazardous noise in his employment sufficient to have caused bilateral sensori-neural hearing loss and, accordingly, denied the appeal.

During the course of this Office's investigation, the Appeal Board transcript was reviewed thoroughly. It was noted that the Chairman

of the Appeal Board panel, in referring to Dr. A's opinion that noise exposure was the major factor in Mr. S's problem, stated that Dr. A's opinion came from the history provided by Mr. S and not from any established evidence of noise exposure at work. Accordingly, the investigator in this case forwarded all copies of the sound surveys to Dr. A in August of 1985 requesting his opinion as to whether the documented noise levels to which Mr. S was exposed would be likely to have caused his hearing loss. In his response of September 17, 1985, Dr. A stated that he had reviewed the sound surveys and examined the literature relating to compensation for noise exposure in the industry. It was his opinion that Mr. S had most likely sustained damage to his ears from noise exposure at work.

This information was forwarded to the Board in a letter of October 11, 1985 requesting that it be reviewed.

In the Board's response of April 8, 1986, Mr. J. Boyd, Ombudsman Administrator for the Workers' Compensation Board, stated that the evidence on file did not give cause to alter the Appeal Board decision in this case. Included with the letter was a memorandum from WCB Ear Claims Specialist, Dr. D, who wrote that the right-sided loss might be compatible with noise-induced etiology, but the left-sided loss with poor discrimination was not entirely typical of a noise-induced hearing loss.

During the course of my investigation, I formed the possible conclusion that the Appeal Board had unreasonably denied Mr. S entitlement for hearing loss and tinnitus as occupationally-induced. In letters dated June 19, 1986, I notified Dr. Robert Elgie and the accident employer of my possible conclusion and consequent possible recommendation that the Board should grant Mr. S entitlement for his hearing loss and tinnitus. Both parties were invited to make submissions to me before I reached any final conclusion.

In support of my possible conclusion and recommendation, I noted that it seemed most important to stress that, while 90 decibels was the continuous level of exposure permitted by law for an eight-hour work day, it did not follow from this that noise exposure under 90 decibels could not and did not cause hearing loss. I pointed out that it was medically accepted that hearing loss could occur between 80 and 90 decibels if a worker was susceptible, as approximately 10% of the population is considered to be. It seemed to me appropriate that Mr. S's hearing loss be regarded in the context of the "whole" man. In this regard, I noted that he had not been exposed to hazardous noise outside of work; he was not in the Second World War and had not seen any active military service; he had not been exposed to drugs which are known to cause hearing loss; and he had been exposed to noise levels at work in the mid-80 decibel range on a continuous basis. Therefore, lacking any other probable or reasonable cause, it seemed logical to assume, as his treating specialist had done, that Mr. S's hearing loss was most likely related to his exposure to noise in the workplace. I also noted that the

Board physician, Dr. D, had given her opinion that the hearing loss was compatible with a noise-induced etiology. I accepted her opinion that the hearing loss in excess of 25 decibels in the left ear did not seem to be related to Mr. S's work as the configuration was atypical for noise-induced hearing loss.

Given the medical support and the evidence of noise in the workplace, it seemed to me that the Board should grant Mr. S entitlement for his hearing loss and tinnitus.

The Manager of General Claims for the accident employer responded to my June 19th letter on July 4, 1986. At that time he requested that I send various documentation, including the reference material, to substantiate my statement that "it is medically accepted that hearing loss can occur between 80 and 90 decibels if a worker is susceptible, as approximately 10% of the population is considered to be".

Accordingly, this documentation was forwarded to the Manager of General Claims by the investigator in a letter dated July 31, 1986.

The Manager of General Claims made his final submission on August 8, 1986, which stated in part:

> ... it continues to be the employer's position that Mr. S's hearing loss was not attributable to noise levels in the workplace, nor does it meet the Workers' Compensation Board requirements for industrial hearing loss.
>
> The report of Dr. A dated 17 September 1985 refers to positions #30 and 31 and I assume this reference is to the Ministry of Labour Sound Surveys conducted at our Maple Yard by [name], P.Eng. on 10 and 23 September 1980. I would point out #30 and 31 applied to Enginemen and the testing was done on Diesel Locomotive 1231. The test performed on the 8000 Series Locomotive #'s 34 to 51 inclusive also apply to Enginemen and there is very little exposure to decibels above 90 and they would be very intermittent.
>
> Mr. S was employed as a yardman and the majority of his worktime is outside and not confined to a locomotive. Dr. A further states that intermittently Mr. S may very well have been exposed to noise in excess of 90 decibels and anything over 90 decibels, if exposed for any significant period of time, can cause hearing loss. The exhaustive inquiry conducted by the employer and the Board, along with the tests conducted by the Ministry of Labour, conclusively substantiate the fact that Mr. S was never exposed to sound levels in excess of 90 decibels for any significant period of time. In fact, the majority of the time he was working, the noise levels would be considerably below 90 decibels and only occasionally and intermittently would he ever be exposed to noise levels above 90 decibels.

> I believe Dr. D succinctly covers this point when she states that the pattern of the right side hearing loss may be compatible with the noise-induced loss with a definite history of noise exposure established. Dr. Thakur further states that the pattern of the hearing loss on the left side is not typical of noise exposure only.

The Manager concluded by stating that my tentative opinion that Mr. S should be granted entitlement was not supported by the facts and evidence in this case.

To date I have received no written response from the Board and I am of the opinion that a reasonable time has elapsed, and that any further delay would not be fair to the worker. Before reaching a final conclusion in this case, I have again considered all of the documentation on file as well as the employer's submissions.

I have also carefully reviewed Board policy on hearing loss. It should be noted that the Claims Adjudication Branch Procedures Manual, Document 33-13-16, states that claims for industrial noise-induced hearing loss shall be considered favourably when all the following circumstances apply:

(a) There is a clear and adequate history of five or more years of exposure to hazardous noise, 90 decibels "A" scale, for eight hours per day, or equivalent as per the Ontario Ministry of Labour regulations.

(b) The frequency level and type of exposure is known.

(c) The average of the four-speech frequency level is 500, 1000, 2000, and 3000 Hertz in the American National Standards Institute or International Standards Organization audiograms is 25 decibels in each ear.

Since individual susceptibility to noise varies, claims which do not meet the criteria set out in "a" above, are individually judged on their own merit having regard for the nature of the occupation, the extent of exposure and any other factors peculiar to the individual case. Benefit of reasonable doubt applies.

I agree with the accident employer's submission insofar as it states that there is not documented evidence of continuous exposure above 90 decibels. However, as I stated in my June 19th letter, there are documented levels of continuous exposure in the mid-80s range; there is no other probable cause to explain Mr. S's equal bilateral hearing loss; and Dr. A has given his opinion that the hearing loss is most probably noise-related. In this regard, I would point out that Dr. A was provided with copies of all the relevant sound level testings, including duration estimates. Also, as I stated in my earlier letter, I am not suggesting

that the additional hearing loss on the left side is noise-related and, in that regard, I have no dispute with the accident employer's submission or reference to Dr. D's remarks. Indeed, I referred to and accepted Dr. D's opinion in my June correspondence.

It seems to me, in considering all the facts of this case, that the most probable cause for Mr. S's 25 decibel bilateral hearing loss (excluding that which is greater in the left ear) is his work environment. Medical opinion supports this as does the noisy work environment, in conjunction with a lack of any other probable cause for the hearing loss. Thus, while I have carefully considered the employer's submissions, I continue to be of the opinion that Mr. S's hearing loss and tinnitus is most reasonably related to his 30 years employment with the accident employer.

Accordingly, it is my conclusion, pursuant to section 22(1) of the Ombudsman Act, that the Appeal Board in its decision of February 20, 1985, was unreasonable to deny Mr. S's claim for noise-induced hearing loss and tinnitus. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that this same Appeal Board decision be revoked and that Mr. S should be granted entitlement for noise-induced hearing loss and tinnitus as a result of his occupational noise exposure. This entitlement would not extend to the hearing loss in the left ear which is greater than that found in the right.

This recommendation was included in a report sent to the Chairman and to the Minister on October 28, 1986.

The Board had not formally responded to the report and recommendations by March 30, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 19

A local Legal Clinic wrote to my Office on Mr. Q's behalf on November 14, 1985. Mr. Q was dissatisfied with an Appeal Board decision dated October 28, 1985, in which he was denied entitlement for hearing loss and tinnitus.

On December 17, 1985, Dr. Robert G. Elgie, Chairman of the Workers' Compensation Board, was notified of our intent to investigate Mr. Q's dissatisfaction with the aforementioned Appeal Board decision. In its reply, the Board indicated that it had no further statement to make at that time. Mr. Q's file was assigned to a member of my investigative staff, who conducted a review of the Workers' Compensation Board claim file supplied by the Board and discussed Mr. Q's case with a staff member of the Legal Clinic. She also wrote to Dr. A, chief otolaryngologist of a Toronto hospital, for a medical opinion.

Mr. Q's claim for hearing loss and tinnitus was received by the Board in January, 1979. He had worked as a bricklayer since 1967 and had been exposed to noise from 1974 to 1980; however, 1975 to 1977 were the only years for which his union representative had actual decibel readings.

Mr. Q saw otolaryngologist Dr. B on May 14, 1979 who related that the hearing loss was consistent with noise exposure, but that this did not account for the definite difference in the two ears. Audiological testing revealed that there was a 20 dB hearing loss in the right ear and a 40 dB loss in the left. Audiologist Mr. C saw Mr. Q in January and June of 1980 with similar audiological findings.

A field examination was ordered by the Board and carried out by a Claims Investigator in November of 1980. Mr. Q's union representative had already written to the Board in October to explain that Mr. Q worked ten-hour shifts; was exposed to noise from a blast furnace of 100 dB; worked around steam valves with noise levels in the area of 130 dB; and, he was exposed to noise of masonry saws and diamond blades where the noise level had been measured at 110 dB. The union representative went on his letter to explain that the worker had also been exposed to noise levels of 95 dB around plastic air guns in the workplace.

The union representative reiterated these figures to the WCB investigator in November of 1980. When the WCB investigator interviewed the respective employer representatives from the three employers, they stated that the furnaces were too far away to have caused damage to Mr. Q and that only the saws were noisy. However, no decibel readings were ever supplied by any of the employers to substantiate claims that the decibel levels were within the required limits. Nevertheless, in its decision of May 21, 1981, the Appeal Board noted that Mr. Q's exposure to hazardous noise in his employment had not been established in accordance with the guidelines governing hearing loss. Moreover, it also noted that the hearing loss present was not sufficient to consider allowance of the

claim in any event and, subsequently, concluded that this claim for entitlement to bilateral hearing loss and tinnitus had not been established.

Subsequent to this decision, the Honourable Russell Ramsay, then Minister of Labour, requested a reconsideration of Mr. Q's claim based on more recent medical reports from Dr. D. The otolaryngologist's first report, dated April 15, 1982 made the following observations:

> Mr. Q has bilateral, asymmetrical sensorineural hearing impairment with an unexplained ABR abnormality. Probably some of his hearing loss, perhaps that on the right side, could be reasonably attributed to noise but in fact his hearing is really quite good on that side. The loss on the left, which is greater, would not likely be due mainly to noise exposure.

In his second report from June 14, 1982, the otolaryngologist commented on the difficulty Mr. Q was experiencing with his tinnitus. He reiterated his opinions on the right and left side hearing loss with audiometric results revealing a 20 dB loss on the right and a 40 dB loss on the left.

In his last report Dr. D stated only that Mr. Q had a little hearing loss with troublesome tinnitus in each ear.

In its decision dated June 28, 1983, the Appeal Board concluded that the submissions from Dr. D did not represent new information which would cause the Board to vary, amend or revoke its decision of May 21, 1981.

Mr. Q originally came to this Office in March of 1984. In my report of November 26, 1984 I concluded that since the medical opinions were unanimous in agreeing that the hearing loss in the left ear which could be attributed to noise was only that which was comparable to the right-sided loss, Mr. Q was left with a bilateral noise-induced hearing loss of 20 dB which might reasonably be related to his work environment. As that was below entitlement for medical aid or a pension or allowance for tinnitus under Board policy, I was not prepared at that time to find the Appeal Board unreasonable to deny Mr. Q's claim for hearing loss and tinnitus.

Mr. Q's representative, a staff member of the Legal Clinic, requested a reconsideration from the Appeal Board on June 23, 1985 based on reports from Dr. E and Dr. F. In his report, Dr. E made the following observations:

> The probability that Mr. Q's hearing loss is related to noise exposure is extremely high because the configuration of his hearing loss suggests traumatic origin. The degree of hearing loss, the probability that it is due to his exposure to the saw, is also moderately high because of his history that this

> is the only significant noise exposure he has had in his lifetime. I do not have actual sound pressure levels on saws but having used these myself I am quite aware that on very short exposure in my workshop they will produce a hearing threshold shift in my own ears.
>
> The fact that his left ear is more significantly involved in the hearing loss than the right does confirm our belief that the saw may have contributed to this because his left ear was, in fact closer to the saw blade.

Dr. E concluded that Mr. Q's significant hearing impairment most probably arose from exposure to the saw blade noise while cutting bricks at work.

In its decision of October 28, 1985, the Appeal Board concluded that the submissions received would not cause the Appeal Board to vary, amend or revoke its decision of May 21, 1981 or grant a new hearing.

Subsequently, the staff member of the Legal Clinic requested that our Office investigate the latest Appeal Board decision.

In reviewing the file, the investigator of this case noted that there was a divergence of medical opinion as to whether the left-sided hearing loss could be reasonably related, in its entirety, to noise exposure. Accordingly, she wrote to Dr. A, otolaryngologist, on January 24, 1986 and again on April 24, 1986 to request his opinion in this matter. Provided for his review were copies of all of the medical opinions, audiological testings, employment history, and levels of exposure to which Mr. Q was most probably subjected. In his response of April 30, 1986, Dr. A concluded that he would accept that the total hearing loss in both ears was due to noise exposure and that the tinnitus was a factor aggravated by the noise. He also believed that Dr. E was correct in his supposition about the left ear being closer to the saw than the right.

During the course of my investigation, I formed the possible conclusion that the Appeal Board had unreasonably denied Mr. Q's claim for hearing loss and tinnitus. In letters dated June 19, 1986, I notified Dr. Robert Elgie and the accident employer of my possible conclusion and recommendation. Both parties were invited to make submissions to me before I reached any final conclusion.

In support of my possible conclusion and recommendation, I noted that there were three distinct matters to be considered in this case:

(1) Was Mr. Q exposed to sufficient noise to have caused his bilateral hearing loss?

(2) If the first point was accepted, was his hearing loss sufficient to receive entitlement?

(3) Should Mr. Q receive entitlement for tinnitus?

The Board policy on hearing loss states that medical allowance shall be granted if the claimant has a 25 decibel bilateral hearing loss and that consideration for a pension shall be granted when there is a 35 decibel bilateral hearing loss. Regarding noise exposure, the Adjudication Branch Manual's policy states that there must be a clear and adequate history of five or more years of exposure to hazardous noise, 90 decibels "A" scale for eight hours per day or equivalent as per the Ontario Ministry of Labour Regulations.

I noted that although the various employer representatives have denied that Mr. Q would be exposed to excessive noise, they have supplied no sound level results to verify this claim. The union representative presented documented noise levels well in excess of those prescribed by law. The Board neither had information to refute high levels of noise exposure nor did it request sound level testing. All of the doctors had accepted that there was sufficient noise to have caused hearing loss and, therefore, I was of the tentative opinion that the Board should accept that Mr. Q had been exposed to sufficient noise to cause his bilateral sensori-neural hearing loss.

In regard to the matter of entitlement, medical documentation indicated that Mr. Q's hearing loss was 20 decibels in the right ear and 40 decibels in the left. Board policy in effect at the time of Appeal Board decision stated that there must be a 25 decibel bilateral hearing loss for medical allowance and a 35 decibel bilateral hearing loss for a pension. This is so even though a 1% pension is awarded for a traumatic hearing loss of 30^{+} decibels in one ear and no loss in the other. In my letter I noted that I had taken the position in the past that these policies result in inequitable treatment of hearing loss. Although the Board has argued that there are two different clinical entities to be considered and that traumatic loss takes much more adaption than gradual loss, I have seen no medical evidence to date to support this position in any of the texts researched. Dr. A, the noted otolaryngologist on whom the Board relies, has made it very clear that, in general, traumatic hearing loss would not be as handicapping at this minimal level as would the bilateral noise-induced hearing loss. Therefore, it was my tentative opinion that Mr. Q's hearing loss of 20/40 decibels should be eligible for a pension as he has a hearing loss in the one ear greater than 30^{+} decibels.

Turning lastly to the matter of tinnitus, I noted that the Adjudication Branch Manual's policy states that a claim for tinnitus would be considered when there was an acceptable claim for industrial noise hearing loss; there was a clear and adequate history of two or more years of bilateral, continuous and severe tinnitus; and the tinnitus had been confirmed by a consultant with facilities for testing tinnitus.

It was my opinion that, if the Board were to accept the claim for industrial noise-induced hearing loss as argued above, then entitlement for tinnitus would apparently flow from that as Mr. Q had a clear and documented history of troublesome tinnitus, confirmed by all of the specialists whom he had seen.

In conclusion, I observed that while my investigation had not been terminated and that my views remained opened regarding the particulars of Mr. Q's claim, it should be noted that my opinion on the Board policy regarding traumatic and noise-induced hearing loss was firm. I had issued several reports on this very point, and thus, that particular part of my summation could not accurately be phrased as "tentative"; nevertheless, I invited representations concerning the other specifics of Mr. Q's claim.

To date I have received no written response from the Board or the accident employer. I am of the opinion that a reasonable amount of time for response has elapsed and that any further delay would not be fair to the worker. Before reaching a final conclusion in this case, I have again carefully considered all the facts involved. I would stress that Dr. A has reviewed this file in its medical entirety and concluded that he would accept that the total hearing loss in both ears was due to noise exposure, and that the tinnitus was a factor aggravated by the noise. As Dr. A is one of the foremost experts in the field of noise-induced hearing loss, I see no reason not to accept his findings. Regarding the threshold question of whether or not Mr. Q was exposed to sufficient noise levels to warrant entitlement, I would point out that the only available documentation on file indicates that he was. The fact that sound level surveys were neither provided by the employers nor requested by the Board should not act adversely in the adjudication of Mr. Q's claim, as he was in no way responsible for this lack of activity.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board in its decision of October 28, 1985, was unreasonable to deny Mr. Q's claim for noise-induced hearing loss and tinnitus. It is, therefore, my recommendation pursuant to section 22(3)(g) of the Ombudsman Act, that this same Appeal Board decision should be revoked and that Mr. Q should be granted entitlement for noise-induced hearing loss and tinnitus.

This recommendation was included in a report sent to the Chairman and to the Minister on October 8, 1986.

The Board had not formally responded to the report and recommendations by March 30, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 20

On July 2, 1986, Mr. U expressed his dissatisfaction with an Appeal Board decision dated June 18, 1986. His file was assigned to a member of my investigative staff.

On July 8, 1986, the Workers' Compensation Board was notified of our intent to investigate Mr. U's contention that the Appeal Board unreasonably concluded that the development of his symptoms in his hip was coincidental and that they were not related to his accident on October 25, 1976.

On October 25, 1976, while working for the accident employer, Mr. U tripped and fell, suffering a severe bruise of the sacrum. He received temporary total disability benefits until July 18, 1977.

In May, 1977, his orthopaedist, Dr. A, recommended that Mr. U be reviewed at the Board's Centre in Downsview because of the chronicity of his symptoms and the lack of any improvement. Thus, he was admitted to the Centre for a few days in July, 1977 and was discharged as fit to return to his regular work.

Mr. U continued to complain that he was suffering from back pain which made it difficult for him to retain a job. He continued to seek medical attention and in October, 1980 was again examined by an orthopaedist, Dr. B, because of back pain and pain to the right leg. On December 11, 1980, Dr. B noted Legg-Perthes' disease and concluded, "It appears that he does have evidence of previous Legg-Perthes' disease which became symptomatic at the time of his fall on October 25, 1976." Mr. U stopped working on January 4, 1981, because of a lack of work and because his recurrent hip pain was becoming more severe.

Dr. B referred Mr. U to an orthopaedist in Toronto, Dr. C, who, on June 22, 1981, concluded, "He is appealing his claim with the Board and I think quite likely it should be allowed on an aggravation basis." Dr. C agreed with Dr. B that surgery would be required on the right hip.

On October 14, 1981, one of the Board's doctors, Dr. D, noted,

> I would simply note that this is a Schedule II accident employer and the contention now being advanced, if accepted, would involve very substantial expenditure in the light of his age and the problem documented.

After reviewing Mr. U's medical history, Dr. D concluded,

> Despite these two opinions [Drs. B and C], I cannot myself feel that we would be justified in accepting this hip joint on an aggravation basis. There is no indication at all from the clinical documentation that any complaints were associated with

> it up to nearly four years after the incident and this despite the fact that one orthopaedic surgeon seeing him was aware of the x-ray change and comments specifically on the matter.

On the same date surgery was performed on the right hip.

On February 26, 1982, Dr. B, in a report to Mr. U's lawyer, noted,

> I must admit, I cannot disagree with any of the comments put forward by Dr. D. The only comment I have is that perhaps his back problem and his initial radiation of pain into the right leg region made him walk in an abnormal gait, and perhaps this aggravated his right hip condition.

Dr. B concluded, "I still personally feel that Mr. U should receive entitlement from the Workers' Compensation Board as a result of this injury."

On May 20, 1983, an Appeal Board hearing was held in Toronto. At the hearing, Dr. C attended and explained that an injury such as Mr. U's could aggravate a condition such as Legg-Perthes. Following the hearing, further medical evidence was requested.

In June, 1983, a Board investigator contacted Mr. U's family doctor, Dr. E, regarding his complaints about hip problems. The Board investigator's report noted,

> Dr. E was personally contacted and he indicated that he was well aware that this man had a right hip problem since his original accident.... He also stated that this man continued to have right hip problems right to date.
>
> He also confirmed that this injured worker did not complain of any hip problems, nor did he give him any treatment prior to his accident in 1976.

Dr. E delivered Mr. U in 1957 and has been his family doctor since that time.

On August 19, 1983, in response to the Appeal Board, Dr. D concluded,

> My own opinion in this situation remains that which I have already recorded. I recognize that it is opposed by what the family physician has now told the field investigator and also by an orthopaedist of considerable standing at the Appeal Board hearing.

On December 16, 1983, the Appeal Board denied Mr. U's appeal after noting and accepting:

> that evidence did not establish the presence of a right hip injury occurring on October 25, 1976;
>
> that medical evidence supported the presence of a condition diagnosed as Legg-Perthes' disease present in the right hip prior to the accident on October 25, 1976;
>
> the opinion of the Board's surgical consultant that the right hip disability was related to the previous non-compensable Legg-Perthes' disease.

Subsequently, Mr. U's difficulties persisted. On February 14, 1984, Dr. B noted,

> ... it is difficult to know radiologically whether he has a solid fusion of the right hip. Clinically there seems to be some movement at the site of the right hip suggesting that the arthrodesis is not fully stable.

Prior to this Office's earlier investigation, arrangements were made for a review of Mr. U's file by a member of the Department of Occupational and Environmental Health section at St. Michael's Hospital in Toronto. This specialist, Dr. F, noted,

> Legg-Perthes' disease is a disease that usually begins in childhood and if undetected and untreated can lead to degenerative arthritis in the hip joints. In other words the hip joints are very susceptible to the evolution of further disease. If any injury occurs at a given point in time even though the individual has been perfectly healthy and normal up to that point, the injury may aggravate or initiate the degenerative process in the hip. I believe this is what has occurred in Mr. U's case.

As part of this Office's earlier investigation, we wrote to the Board on June 29, 1984 and enclosed Dr. F's report in order that the Appeal Board might reconsider its previous decision. On November 22, 1984, we were informed that the Board had written to the accident employer regarding this further evidence. It would appear that the Board had been considering acceptance of the claim. On December 17, 1984, we were informed that the accident employer had strenuously opposed granting entitlement to Mr. U. On December 31, 1984, the Appeal Board concluded,

> In order that both Mr. U and the representative of his choice, as well as the employer, may have an opportunity to adequately make submissions on the new evidence [presented by this Office] the Appeal Board directs that Mr. U be granted a new hearing.

As Mr. U had been granted a new hearing, we closed his file at this Office.

On May 6, 1985, the appeal was heard in Toronto. Subsequent to the hearing, the Appeal Board directed that the file should again be reviewed by Dr. D, who concluded that Dr. F's report did not have "... significant weight on the basic issue in this claim." The Appeal Board then directed that Mr. U be offered the choice of three physicians to act as a medical referee and an orthopaedist, Dr. G, was chosen.

On January 30, 1986, Dr. G examined Mr. U and noted that he walked with a limp, but that his overall gait was not too bad. Dr. G also noted that he did not have the x-rays prior to the hip fusion, but that the x-rays after the fusion revealed old Legg-Perthes' disease. Dr. G concluded,

> The problem here is that he had asymptomatic Legg-Perthes' disease prior to the accident. It is possible that the accident precipitated symptomatology in a previously asymptomatic joint. At the same time, he probably would have developed symptomatology eventually anyway. It is therefore a difficult situation. It is my feeling that he should not be given a permanent disability pension because of his hip. I think, however, that a fair compromise might be for him to be retrained for the type of work his hip will allow him to do and for him to be on compensation during that retraining period.

The x-rays prior to the fusion were not available.

According to the Appeal Board decision, dated June 18, 1986, Dr. G "... advised on April 15, 1986 that without having the x-rays taken prior to the hip fusion, he did not wish to make any further comments." In that decision, the Appeal Board concluded, "... the development of Mr. U's symptoms in his hip were coincidental and not related to his accident of October 25, 1976." The Appeal Board reached this conclusion after noting and accepting:

> the comments from the Board's surgical consultant in May of 1985;
>
> the report from Dr. G dated January 30, 1986;
>
> Mr. U was asymptomatic until approximately 1 1/2 years post-accident.

When we wrote to the Board in June, 1984 and enclosed Dr. F's report, we noted that three orthopaedists supported Mr. U's contention that his pre-existing hip condition was aggravated by his accident in October, 1976. Further, we noted, Dr. C attended as a witness at the Appeal Board hearing in May, 1983, something which very few orthopaedists will do. We also noted that the Board investigator had established from interviewing Dr. E that there was a continuity of complaint from the time of the accident.

After the Appeal Board hearing in May, 1985, the panel again requested Dr. D's opinion. Given his longstanding opposition to the claim, it seems that it might have been more appropriate for the Board to request a review from another member of its medical staff. Subsequent to Dr. D's review, the matter was referred to a medical referee, Dr. G. The reasons for this referral are not clear to me. There is nothing in the file to indicate that either the employer or the employee made such a request. Nor was this a case where there existed an even division of medical opinion requiring a deciding report. Only Dr. D had opposed entitlement and he, himself, admitted this was in opposition to "the family physician" and "an orthopaedist of considerable standing" (Dr. C). Further, Dr. F, a specialist, had also provided a detailed analysis behind his conclusion that Mr. U's work accident had aggravated or initiated the degenerative process in the hip.

Given the above consensus, it would appear that the preponderance and weight of medical evidence were in Mr. U's favour. The appointing of a medical referee appears to have precipitated an unnecessary delay in the decision-making process: from June of 1985 to June of 1986.

If one looks to Dr. G's report, one finds that he did not rule out the possibility that the "accident precipitated symptomatology in a previously asymptomatic joint." The doctor's opinion that Mr. U would probably have developed symptomatology eventually anyway would not seem relevant to the issue of entitlement itself.

I do not understand the Appeal Board's decision, especially in light of Dr. G's opinion. It seems that Mr. U should be granted entitlement for his hip injury on an aggravation basis and assessed for a permanent disability rating as expeditiously as possible. Given the overwhelming medical evidence in support of the claim, that was on file as early as 1984, it is most unfortunate that Mr. U's case is still ongoing.

After considering the above, I wrote to Dr. Elgie on September 19, 1986, pursuant to section 19(3) of the Ombudsman Act, and outlined my tentative conclusion that the Appeal Board had acted unreasonably when it had concluded that the development of symptoms in Mr. U's hip was coincidental and that they were not related to his accident on October 25, 1976. I also wrote to the accident employer and outlined my tentative conclusion.

On October 1, 1986, a response was received from an official of the accident employer. This official noted various medical reports to support the company's position that Mr. U's right hip disability was not related to his accident in October, 1976. Further, this official referred to the selection of Dr. G as a medical referee and emphasized the parts of Dr. G's report which supported the company's position. It would also appear that this official supported the positions of the doctors employed by the Board over those who had actually treated Mr. U.

I have considered these representations carefully and, in my opinion, the preponderance of medical evidence does support Mr. U's claim as, at the time of the Board's decision in June, 1986 four orthopaedists supported further entitlement to benefits for Mr. U. Also, it should be noted that two of the doctors cited by the company, Drs. A and H, examined Mr. U in 1977 and early 1978 for a back disability. Neither doctor reviewed the x-rays, and, as noted, the right hip problem was not recognized until late in 1980. Despite the comments about Drs. B and E, both are on record as supporting Mr. U's further entitlement to benefits and no discussion of their reports will change either position on this matter. Dr. J was not involved in this case as a medical doctor. Drs. K and D conducted only paper reviews. If one wishes to tally the members of the medical profession noted in the employer's letter, there are four orthopaedists and the family doctor supporting Mr. U's contention and there are two orthopaedists, who are unaware of the hip condition under discussion, and two Board doctors and a member of the former Appeal Board Panel who do not view the condition as compensable.

To date, I have not yet received from the Board a response to my letter of September 19, 1986. I believe that it has had a reasonable amount of time in which to respond, and that any further delay would be unfair to Mr. U. As my views on this matter remain unchanged, it is my opinion that the Appeal Board, in its decision dated June 18, 1986, was unreasonable to conclude that the development of symptoms in Mr. U's hip was coincidental and that they were not related to his accident on October 25, 1976. [Reference: Ombudsman Act, section 22(1)(b)]

It is my recommendation that the Appeal Board's decision should be revoked and that Mr. U should be granted entitlement to benefits for his hip disability. [Reference: Ombudsman Act, section 22(3)(g)]

This recommendation was included in a report sent to the Chairman and to the Minister on November 28, 1986.

The Board had not formally responded to the report and recommendations by March 30, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 21

Mr. X first contacted my Office in Thunder Bay on October 7, 1985, with respect to his objection to a decision of the Workers' Compensation Board. The Workers' Compensation Board was notified of our intent to investigate by letter dated November 22, 1985. Specifically, Mr. X contended that the Appeal Board, in its decision dated December 19, 1983, was unreasonable to conclude that disablement did not arise out of and in the course of his employment. The file was assigned for investigation to a member of my investigative staff.

Mr. X began employment as a letter carrier on July 24, 1978 on a part-time basis. In 1979 he was taken on as a full-time letter carrier and was assigned what was known as a "heavy walk", both in terms of heavy volume and distance.

Mr. X experienced a gradual onset of lower back pain in March or April of 1980. However, at that time, the pain was not sufficient to cause Mr. X to lose time from work, or for that matter, to seek medical attention. When the pain increased, Mr. X sought chiropractic attention from Dr. A on August 20, 1980. He laid off work on August 26, 1980. Chiropractic treatments were continued until September 11, 1980 at which time he was advised to consult his family doctor, Dr. B. Mr. X was examined by Dr. B on September 15, 1980 and was started on a course of physiotherapy at a hospital on September 23, 1980 continuing until October 23, 1980, with no improvement. On November 4, 1980 his low back pain was increasing and he was getting no relief from analgesics. He went to the emergency department of the hospital, where a myelogram and discogram were performed on November 11, 1980. A discotomy was performed on November 17, 1980 by Dr. C, orthopaedic specialist. Mr. X was unable to return to work until September 1, 1981.

I have reviewed the medical evidence on file, notes of the WCB investigation which include records of conversations with Mr. X's co-workers and supervisor, and the testimony of Dr. A, Chiropractor, at the Appeal Board hearing of October 17, 1983. My observations are as follows:

(1) Dr. C, the treating and operating orthopaedist, has noted in both his written report of February 23, 1981 and his certificate of disability for the worker dated March 12, 1981, that Mr. X's disability can be characterized as being causally related to his work;

(2) Dr. A, Chiropractor, has noted in his report of November 28, 1980 as well as in his testimony at the Appeal Board hearing of October 17, 1983, that Mr. X's disability should be accepted as being causally related to his work. He also told the Appeal Board that he had noted a high incidence of letter carriers complaining of neck/shoulder/arm disabilities and lower back disabilities in his practice. As a result of his initial observations, Dr. A surveyed letter carriers and determined that a significant majority experienced neck/shoulder/arm problems and lower back disabilities. The results of his research were presented to union and management officials of the employer in 1980.

To verify the results of Dr. A's research, the employer contacted Dr. D who conducted a similar research project to the one initiated by Dr. A. The results of that research were similar to Dr. A's results and a further check on the accuracy of the research was obtained as a result of further investigation by a chiropractic college in Toronto. Once again, the results were similar to those of Dr. A.

As a result of Dr. A's work, he was instrumental in devising a new mailbag which has thick padding in the shoulder strap, and more importantly, implements a lumbar sacral support belt, moving the weight off the shoulder structure to the pelvis. Dr. A had noted in his remarks to the Appeal Board that weight of the contents of the mailbag was less of a factor than the weight being carried in an unbalanced manner.

(3) A co-worker of Mr. X's and an Assistant Supervisor both advised a WCB investigator in January of 1981 that lower back complaints are very common with letter carriers. Both were able as well to confirm Mr. X's version of the onset of his pain and subsequent disability.

The question which remains is whether or not Mr. X's lower back disability arose out of and/or in the course of his employment as a letter carrier. It would seem that section 1(1)(a)(iii) of the Workers' Compensation Act clearly establishes entitlement for conditions that arise from the accumulative effect of one's occupation, as opposed to a specific trauma as defined by section 1(1)(a)(i) and (ii).

Based on the above information, I wrote to Dr. Elgie and the accident employer on July 7, 1986 outlining my tentative recommendation that Mr. X's low back disability is causally related to his work, thereby entitling him to benefits for the period August 26, 1980 to September 1, 1981. While the accident employer responded, the Workers' Compensation Board had not done so within four months. I believed that the Board had a reasonable amount of time in which to respond and that any further delay would be unfair to Mr. X.

As my views on this matter remained unchanged, it was my conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that Mr. X's low back disability was causally related to his work as a letter carrier. Consequently it was my recommendation, pursuant to section 22(3)(g), that he be granted entitlement to benefits on the basis of disablement arising out of and in the course of his employment for the period August 26, 1980 to September 1, 1981.

This recommendation was included in a report sent to the Chairman and to the Minister on October 20, 1986.

The Board had not formally responded to the report and recommendations by March 27, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 22

Ms. DD's objection to a decision of the Workers' Compensation Appeal Board dated October 1, 1985 was received by my Office on October 28, 1985. Ms. DD contended that the Appeal Board was unreasonable to have denied her entitlement to compensation benefits subsequent to August 13, 1984 for back and right shoulder disabilities related to her accident on December 26, 1983. She also maintained that the work she attempted from January 7 to 16, 1985 aggravated these disabilities, causing her again to be totally disabled from working.

After clarification with the Workers' Compensation Board concerning the issues, Dr. Robert G. Elgie, Chairman of the Workers' Compensation Board, was notified on January 7, 1986, of our intention to investigate Ms. DD's objection. In response, the Board advised by letter dated January 14, 1986 that it had no further statement to make and, in due course, a photocopy of Ms. DD's claim file was forwarded to my Office.

Ms. DD's file was assigned to a member of my investigative staff, who thoroughly reviewed the information contained in the claim file and discussed Ms. DD's contentions with her over the telephone.

During the course of our investigation, it appeared that I might support Ms. DD's objection, and make a report and recommendation that might adversely affect the Board and the accident employer. Therefore, on May 16, 1986, in accordance with section 19(3) of the Ombudsman Act, I notified both parties of my views and invited them to make further representations to me if they so wished.

On the basis of the information available to me, I considered the following conclusion and recommendation:

Possible Conclusion:

The Appeal Board, in denying Ms. DD entitlement to additional compensation benefits, unreasonably concluded that her continuing back and shoulder disabilities were not causally related to her compensable accident. Also, given the weight of medical evidence, the panel was unreasonable in its conclusion that she had reached her pre-accident condition on August 13, 1984. [Reference: Ombudsman Act, section 22(1)(b)]

Possible Recommendation:

The Appeal Board decision should be revoked and Ms. DD should be granted entitlement to temporary total benefits beyond August 13, 1984. In addition, the Board should grant entitlement subsequent to January 16, 1985 for a recurrence of her compensable problems. [Reference: Ombudsman Act, section 22(3)(g)]

This possible conclusion and recommendation were based on the following information.

Ms. DD had been employed as a Registered Nursing Assistant with the accident employer since March of 1975. She had pre-existing scoliosis from T6 to L1. In 1983, she had had a chest x-ray because of influenza. This x-ray had revealed scoliosis and she had consulted Dr. A, orthopaedic surgeon, in August, 1983 for information and reassurance about this condition. She was not having any problems attributable to her scoliosis, but Dr. A suggested that she avoid heavy lifting, frequent bending and low-level work as precautionary measures. He did not recommend a change of occupation and, as she was capable of performing her duties, Ms. DD continued with her job.

On December 26, 1983 Ms. DD injured her back and right shoulder when, as she was positioning a patient, she slipped and fell on a wet floor. When her injury did not improve, Ms. DD saw her family physician, Dr. B, on January 3, 1984. He diagnosed strain of the lumbar spine, the right shoulder and the cervical spine. He considered the injury sufficient to disable her from working and prescribed analgesics. X-rays taken on January 6, 1984 revealed minor scoliosis, early disc degeneration at L2-3, and a normal right shoulder.

On January 30, 1984, Ms. DD was seen by Dr. A who reported considerable stiffness in her spine with 50 degrees of right scoliosis. Dr. A did not feel that any specific treatment was indicated, but he recommended that she permanently avoid lifting in the bent position, protracted standing and frequent bending.

In February and March of 1984, Ms. DD continued to see Dr. B. He stated that she was still unable to work due to tenderness, muscle spasm and restricted movement in her cervical spine. Ms. DD was attending physiotherapy and doing exercises at home while continuing on medication. She did not improve, however, and on April 10, 1984 was referred back to Dr. A, who recommended admission to the Board's Rehabilitation Centre for assessment and treatment.

On June 22, 1984, Ms. DD was admitted to the Downsview Rehabilitation Centre. Her main complaints were of soreness in the right side of her neck, numbness down into her right shoulder, headaches and dizziness. Dr. C examined her on admission and reported a full range of motion in her neck and shoulders with normal reflexes. It was felt that Ms. DD had suffered cervical and thoracolumbar strains and that some of her symptoms were functional. While at the Centre, Ms. DD received occupational therapy, gym instruction, psychological group counselling, and relaxation instruction. Ms. DD did not seem to improve and the psychometrist reported that she was "fixated on negative perceptions." The occupational therapist recommended discharge to modified work.

In his discharge report of August 2, 1984, Dr. C noted that the pre-existing thoracic scoliosis did not seem to be causing Ms. DD much

trouble. He stated: "In my opinion Ms. DD is fit to resume her pre-accident employment. If she continues to complain, her outside doctors should x-ray her neck." As a result of this opinion, Ms. DD was advised that her compensation benefits would be terminated on August 13, 1984.

Ms. DD did not agree with Dr. C's opinion and saw Dr. A on August 10, 1984. Dr. A noted that it had been suggested that she return to her normal duties, but he believed that a transfer to a different type of job, with the restrictions which he had previously recommended, would avoid repeated problems.

On August 16, 1984, Dr. B, who had seen Ms. DD weekly from January to May, 1984, reported superficial tenderness in the paraspinal muscles in Ms. DD's cervical and lumbosacral areas. Dr. B believed anxiety and depression were partially responsible for her chronic pain. He stated: "My conclusion is that Ms. DD has scoliosis and sustained an injury to the cervical spine and [is] still considerably disabled."

Ms. DD was examined by Dr. E, neurologist, on August 16, 1984. Dr. E observed that Ms. DD was somewhat depressed and apprehensive. He believed that her symptoms were related to muscle spasm superimposed on mild traumatic lumbago and pre-existing scoliosis.

By letter dated September 13, 1984, Dr. B advised Ms. DD's employer that she still had considerable residual symptoms from the accident consisting of pain in her right shoulder, neck and low back. He stated that she would be able to return to light duties on October 1, 1984. However, the hospital's Director of Personnel informed Ms. DD that there was no light duty work available. It was suggested that she remain off work until sufficiently recovered to resume her former duties.

The Board's surgical consultant was asked for an opinion on Ms. DD's degree of disability. In a memo dated September 19, 1984, Dr. F expressed his opinion (without the benefit of having examined Ms. DD) that her acute aggravated back strain had resolved on discharge from the Rehabilitation Centre. He considered her continuing complaints to be due to her thoracic scoliosis and that Dr. A's recommendation that she obtain other work was based solely on the fact that she had scoliosis. The Claims Review Branch, therefore, confirmed the decision which had terminated Ms. DD's compensation benefits as of August 13, 1984, and accepted that any continuing disability was due to her prior non-compensable condition.

In his report dated October 30, 1984, Dr. G, neurosurgeon, noted that Ms. DD was rather anxious and quite tense. On examination there was no muscle spasm in her back or neck and movements were normal considering her obvious scoliosis. He noted tenderness on the right side of her neck. Flexion and extension of her neck were uncomfortable at the extreme ranges. Dr. G believed Ms. DD had sustained a soft tissue injury to a spine made vulnerable by her scoliosis and had muscle tension

symptoms. He suggested that she increase her activities although this might be a little uncomfortable at first.

On December 12, 1984, Dr. B addressed a letter to Mr. H, who was representing Ms. DD in her appeal of the Claims Review Branch decision. Dr. B stated: "She has not regained her pre-accident health, she is still unable to do any heavy lifting or any kind of heavy work." (Emphasis added.)

Ms. DD returned to her work as a Registered Nursing Assistant on January 7, 1985; however, on January 16, 1985 while at work, she suffered dizziness, faintness, severe headache and spasm in the back of her neck. She was seen in the emergency department at the hospital, given Demerol and Gravol, and sent home. She has not worked since this time. Mr. H advised the WCB of this incident, claiming it as a recurrence. The Board refused to accept a recurrence as the Claims Review Branch had denied further entitlement, accepting that Ms. DD had recovered from her compensable aggravation by August of 1984.

Dr. J, neurologist, examined Ms. DD and, in his report dated January 29, 1985, expressed the opinion that her congenital scoliosis might have predisposed her to a neck and back strain. Dr. J would have expected her to have recovered from her injury in six to twelve months. He felt that her persisting complaints of headache, arm weakness, spasms and dizziness suggested a functional etiology. However, Dr. J believed she should be encouraged to find light work.

On February 6, 1985, Mr. K, D.C., reported he had first seen Ms. DD on August 17, 1984. He had treated her with electrotherapy and manipulation which had resulted in some improvement. He had also suggested that she return to light duties in October, 1984. He stated that it was "apparent that her injury disturbed and exacerbated a pre-existing asymptomatic scoliosis." He suggested that retraining be considered.

At the Appeals Adjudicator hearing on February 11, 1985 Ms. DD advised that she had registered with Manpower and had looked unsuccessfully for light work from October to December, 1984. Ms. DD stated that her scoliosis had not caused her any discomfort prior to the accident in December, 1983. She had seen Dr. A in August of 1983 simply for clarification of the condition. He had suggested limitations in certain activities; however, because she remained asymptomatic, her employer had seen no need to alter her work duties. The Appeals Adjudicator, however, accepted the opinion that Ms. DD had returned to her pre-accident condition by August 13, 1984 and denied her appeal.

On March 12, 1985, Dr. L, orthopaedic surgeon, reported that Ms. DD had slight contraction of the cervical muscles with movement restricted to 3/4 of the normal range. There was muscular crepitus in both shoulders and ankle jerks were absent. He recommended that she stop her chiropractic treatments and that the WCB provide her with a home

traction unit. Dr. L suggested that she wear a cervical brace occasionally and he stated that it was quite common for people with scoliosis to experience cervical pain. He did not recommend orthopaedic surgery as her scoliosis was not progressive and he encouraged her to find light work.

Mr. H represented Ms. DD at the Appeal Board hearing and contended that she had not recovered from the aggravation to her pre-existing condition by August 13, 1984. The Appeal Board accepted the opinion contained in the discharge report from the Rehabilitation Centre that Ms. DD had been able to resume her pre-accident employment, and also the findings of Dr. G who had noted normal movements considering Ms. DD's spinal configuration. The panel did not accept the opinion of Mr. K, D.C. It was concluded that the evidence did not establish that Ms. DD's continuing spinal and right shoulder disabilities were causally related to the accident of December 26, 1983. The Appeal Board also concluded that she had reached her pre-accident condition on August 13, 1984. In its decision dated October 1, 1985, the panel denied entitlement to any additional compensation benefits.

Following this decision, on October 10, 1985 Dr. A examined Ms. DD again. He noted that in spite of his suggestions, she had returned to full duties in January, 1985. Dr. A was of the opinion that the deformity of her spine was producing cervical muscular spasm serious enough to prevent her from coping with the duties of a Registered Nursing Assistant. He again recommended modified work.

In support of my possible conclusions and recommendation, the findings of our investigation and my observations were summarized as follows.

My investigator had spoken with Ms. DD regarding her pre-accident condition. Ms. DD had received her nursing training in England and came to Canada in 1967, where she worked at a hospital. She moved to the United States in 1970 and worked as a practical nurse in a hospital until her return to Canada. On March 5, 1975, she commenced her employment with the accident employer where she remained until her accident in December, 1983. Ms. DD's scoliosis had not bothered her during all this time and she had been able to pass the physical examinations required by Immigration and her employers. It was clear from this history that Ms. DD had been steadily employed for many years and capable of performing the duties of a demanding profession prior to her accident on December 26, 1983.

Although Dr. G reported in 1984 that Ms. DD's back movements were "normal considering her obvious scoliosis", he believed she had sustained an injury to "a spine made vulnerable by her scoliosis." Dr. J was also of the opinion that her congenital scoliosis might have predisposed her to neck and back strain. He expected her recovery would take six to twelve months. The chiropractor, Mr. K, stated that Ms. DD's injury exacerbated her previously asymptomatic scoliosis. In August,

1983, Dr. A had indeed advised Ms. DD to take precautionary measures, but he had not suggested that she change her occupation. However, following her compensable accident, Dr. A was of the opinion that she could no longer cope with her nursing duties. In March, 1985, Dr. L reported that the type of scoliosis Ms. DD had was not progressive.

It appeared on the basis of this evidence that the compensable accident on December 26, 1983 had indeed permanently aggravated a pre-existing asymptomatic condition. I was of the tentative opinion that the Appeal Board had been unreasonable in its conclusion that her continuing disabilities were not causally related to the accident in December, 1983.

It was also my tentative opinion that the panel had unreasonably concluded that she had reached her pre-accident condition on August 13, 1984. Although Dr. C felt that Ms. DD could resume her pre-accident employment on discharge from the Rehabilitation Centre, he acknowledged the possibility of unresolved disability by his statement that her own doctors should x-ray her neck if her complaints continued. The occupational therapist had recommended a discharge to modified work. In August, 1984, Dr. A recommended that Ms. DD transfer to a different type of job. Also in August, 1984, Dr. B reported that she was still considerably disabled. In his letter of December 12, 1984, Dr. B very definitely stated that Ms. DD had "not regained her pre-accident health."

Ms. DD's doctors did not recommend a return to work until October 1, 1984 and, even then, it was stated that she should only attempt a light job. Ms. DD contacted her accident employer and was advised that no light work was available. Despite her considerable length of service with this employer, she registered with Manpower and attempted, unsuccessfully, on her own to find suitable work. The Workers' Compensation Act clearly provides for the payment of benefits equal to those for total disability when a worker is only partially disabled, unless the worker fails to accept or is not available for employment which is available and suitable for his/her capabilities. When Ms. DD did attempt to return to her regular work in January, 1985, she suffered a further aggravation arising out of and in the course of her employment in attempting to perform the strenuous duties which her physicians had advised against.

I noted the opinion of the Board's surgical consultant, Dr. F; however, his opinion had been rendered without the benefit of his having examined Ms. DD. While the Board chose to rely on the discharge report from the Downsview Rehabilitation Centre and the review memo by Dr. F, it seemed that the medical evidence from her family doctor and treating specialist was more persuasive. One should consider that they were in the best position - by virtue of actual observation - to compare the pre- and post-accident state of the worker. Based on their reports, it seemed that the Board terminated Ms. DD's benefits prematurely.

I did not receive any response to my tentative conclusion and recommendation from the Workers' Compensation Board. On June 2, 1986,

further submissions were received from the Vice-President, Human Resources, representing the accident employer. Included were letters concerning Ms. DD's insurance benefits and a report dated March 19, 1986 from Dr. B.

I was advised that Ms. DD's regular duties in obstetrics and gynecology were among the lightest available to nursing assistants. Bending, standing, walking and some lifting were required, but the employer did not consider this work to be heavy. Her injury, however, had occurred while she had been temporarily assigned to another unit due to a fluctuation in workload. The employer had no knowledge of Ms. DD's performing strenuous work between January 7 and 16, 1985, when she experienced further pain.

The hospital was of the view that Ms. DD "is clearly suffering a continuing disability" for which she received disability insurance benefits. The employer believed the difficulty lay in determining how much of her disability was related to her pre-existing back condition, the December 26, 1983 accident, and/or her state of mental health. It was suggested that Ms. DD's tension, anxiety and depression had pre-dated her injury.

It was also noted that in his report Dr. B described advanced scoliosis at Ms. DD's thoracic lumbar spine. The effect of my possible recommendation on Ms. DD's insurance benefits, which were subject to a non-duplication clause, was also considered.

Ms. DD was advised of the employer's remarks. She informed my investigator that on the basis of a medical examination, the insurance company no longer considered her to be totally disabled and her disability benefits terminated effective August 23, 1986.

In his report of March 19, 1986, Dr. B stated that Ms. DD had been unable to work since her 1983 accident and had never regained full use of her right upper extremity or full mobility of her cervical spine. As a result of her long disability and lack of progress, Dr. B felt she had developed depression. He concluded that she was permanently disabled.

Ms. DD's pre-existing scoliosis had been acknowledged by all the physicians who examined her. The fact remained, however, that she had been capable of steady employment until she suffered an injury at work on December 26, 1983. Medical opinion confirmed that she had not regained her pre-accident health. As well, her doctors had advised her against returning to work as a Registered Nursing Assistant. Ms. DD suffered a recurrence of pain and disability in January, 1985 while attempting to perform the work she was advised not to do. In my opinion, the evidence supported that her compensable accident permanently aggravated a previously asymptomatic condition.

Ms. DD had expressed a wish for retraining. In view of the fact that she is unable to resume the career in which she had invested a

great many years, I did not consider it unreasonable that she would need vocational rehabilitation assistance.

For the above reasons, the information I received from the accident employer did not cause me to alter my views. The Board had sufficient time to reply and I felt that any further delay would not have been fair to Ms. DD. Therefore, it was my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision dated October 1, 1985, unreasonably concluded that her continuing back and shoulder disabilities were not causally related to her compensable accident, and that she had reached her pre-accident condition on August 13, 1984.

I recommended, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board decision be revoked and that Ms. DD be granted entitlement to temporary total benefits beyond August 13, 1984. In addition, the Board should grant entitlement to benefits and vocational rehabilitation assistance subsequent to January 16, 1985.

This recommendation was included in a report sent to the Chairman and to the Minister on September 23, 1986.

The Board had not formally responded to the report and recommendations by March 31, 1987. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

APPENDIX A

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS			
12	1	1. That the Ministry reopen its file and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners Association's responsibility to advise the Ministry of the names of these persons.); that following this review the Ministry, at no cost to the homeowners, repair those homes which suffered damage as a result of a major structural defect relating to original construction or in which there exist substantial defects relating to original construction as reflected in the HUDAC inspection reports; that upon proof of payment of repair costs, the Ministry compensate any of the above-noted homeowners who have repaired damage to their homes caused by major structural defects relating to	13, Rec. 6 ["7"]	1.(a) That the Ministry reopen its file on the matter and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses which are owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners Association's responsibility to advise the Ministry of the names of these persons.) (b) Following this review, the Ministry, at no cost to the homeowners, pay or cause payment to be made for the repair of those homes which have suffered damage as a result of a major structural defect relating to original construction or in which there exist substantial defects relating to original construction as reflected in the HUDAC inspection reports. (c) If any of the above-noted homeowners have repaired damage caused by major structural defects relating to original construction, or any substantial defects relating to	The Ministry has now set up a scheme to evaluate the individual homeowners' claims, and has undertaken to pay all valid claims.

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS (cont'd)			
		original construction, or any substantial defects relating to original construction, as reflected in the HUDAC inspection reports; that the Ministry send reporting letters to the above-noted homeowners indicating the matters about which the homeowners complained as well as the corrective work intended. 2. The Ministry should send reporting letters to those homeowners who are still interested (as indicated to the Ministry by the Homeowners Association), and original deficiency lists. The letter should indicate the matters about which the homeowners complained as well as the corrective work intended.		original construction, as reflected in the HUDAC reports, then these homeowners should be compensated for their actual repair costs. In the Committee's opinion, the Ministry should seek contribution and/or indemnity from HUDAC for the cost of these repairs. The Committee has concluded that HUDAC's actions have in some measure caused or contributed to the Ministry's predicament and to the statements made by the Minister wherein he made commitments to the homeowners.	
		MINISTRY OF THE ENVIRONMENT			
11	10	That the Minister cancel his decision to accept the adjudicator's recommendation not to	12, Rec. 2	That the Minister of the Environment accept in principle that the Crown may, in the appropriate circumstances,	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF THE ENVIRONMENT (cont'd)			
		pay the complainant's claim for interest; that the Minister accept and consider the claim as one properly made under the Public Works Creditors Payment Act.		pay a claimant interest due pursuant to a term of a contract with a contractor; that the Minister consider the merits of the complainant's claim for interest owing on the principal amount in question and formulate a decision whether or not to pay the claim.	By letter dated June 5, 1987, the Committee requested that the Minister of the Environment inform it of the present status of this matter.
		MINISTRY OF HEALTH			
Special Report Mr. F	1	That the Ministry of Health: (a) improve its methodology and data base for the routine assessment of outpatient physiotherapy service adequacy; establish procedures for continuing needs review; and develop an appropriate evaluation and feedback mechanism to assess outpatient physiotherapy needs. (b) immediately grant permission to Mr. F to purchase and transfer to his Belleville facility the privileges attached to facility licence number 34, part I, schedule 9, of Regulation 452 under the Health Insurance Act.	14, Rec. 1	That the Ministry of Health immed...ely grant permission to Mr. F to purchase and transfer to his Belleville facility the privileges attached to facility licence number 34, part I, schedule 9, of Regulation 452 under the Health Insurance Act.	Mr. F has now purchased the privileges in question.

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF LABOUR			
		Workers' Compensation Board			
7	22	That the Appeal Board reconsider its decision, with a view to granting the complainant a temporary supplement to his permanent partial disability award, on the basis of a full consideration of the appropriate test for entitlement to such a benefit. The Appeal Board reconsidered pursuant to the Select Committee's 14th recommendation in its Tenth Report. However, in a decision dated September 20, 1983, the Appeal Board decided the worker was not entitled to a supplement.	11, Rec. 2	That the Workers' Compensation Board reverse its decision of September 20, 1983 and grant the complainant a temporary supplement to his permanent partial disability award. It is understood that the Board retains full discretion in assessing and and quantifying the amount of such supplement.	The Board awarded Mr. N a temporary supplement in the amount of $927.32 for a period of one year only.
		MINISTRY OF NORTHERN AFFAIRS AND MINES			
		Ontario Northland Transportation Commission			
Special Report Mr. R	2	That the Pension Board allow Mr. R to make contributions for the period from six months after his initial date of employment in May 1957.	14, Rec. 2	That the Pension Board of the O.N.T.C. allow Mr. R to make constributions for the period from six months after his initial date of employment in May of 1957. The Committee intends that the period of this contribution will be 18 months ending April, 1959.	The Committee's recommendation has been implemented.

APPENDIX B

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF GOVERNMENT SERVICES			
2	60	That the Ministry pay the complainant the sum of $1,318.00 for his losses and legal expenses.	3, Rec. 34	That the Audit Act and the Financial Administration Act be amended to provide that when such a recommendation is made by the Ombudsman after all necessary and appropriate requirements of the Ombudsman Act have been adhered to by his Office, and when entirely accepted by the governmental organization, "a lawful authority" is created for such money to be paid by the governmental organization out of the Consolidated Revenue Fund. Further, that the Ombudsman's Office and the Ministry of Government Services resume their discussions on the merits of the Ombudsman's recommendation and that the results of these discussions are to be reported to the Standing Committee.	The Ministry of Treasury and Economics has responded and proposed that the Ombudsman Act is the more appropriate statute for the amendment, since the purpose of the amendment directly relates to procedure under that Act. The Ministry proposed that the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to reimburse the complainant for an ascertainable financial loss suffered by him in the matter complained of, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at
			11, Rec. 4	That the Ombudsman Act be amended as follows: "Where the Ombudsman, in a	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
		MINISTRY OF GOVERNMENT SERVICES (cont'd)			
				report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to compensate the complainant for an ascertainable financial loss suffered by him, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum shall, where it is less than $1,000 and has been ascertained as required by this section, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is $1,000 or more, it shall be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."	the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum may, where it is less than $1,000, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is $1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned." The amendment has been included in the package of amendments to the Ombudsman Act.

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		MINISTRY OF GOVERNMENT SERVICES (cont'd)			
			12, p. 16	The Committee noted that the Attorney General has stated that recommendations for these amendments to the Act would be placed before Cabinet. The Committee expects to be dealing with them in the near future.	
			13, p. 8	The Committee recommends that the Attorney-General table immediately in the Legislature a bill amending the Ombudsman Act.	To date, no Bill has been tabled.

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3)(d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
		MINISTRY OF EDUCATION					
2	47	That a more comprehensive insurance policy be made available to students, one which would provide compensation for injuries resulting in the loss of future earning power.	May 4, 1977	The Deputy Minister took steps to meet with insurance industry representatives regarding more comprehensive insurance for students.	3, Rec. 23	That the Ministry forthwith pursue its discussions with the insurance industry and other interested parties for the purpose of developing an appropriate contract of insurance in the indemnity type at a realistic premium which would adequately compensate a pupil for injuries sustained in the case of a pure accident as the result of participation in shop classes and in t organized athletic activities.	The Ministry has decided not to pursue the matter of disability insurance for students. Its position has been stated to the Standing Committee in its letter of January 1987.
					11, Rec. 3	That recommendation 23 of its Third Report be implemented by the Ministry of Education by means of a policy of insurance on a province-wide basis before the end of 1984.	
					12, p. 9	The Committee urged the Ministry to move quickly and said it expected the recommendation to be	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3)(d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
		MINISTRY OF EDUCATION (cont'd)					
						implemented before its next hearings.	
					13, Rec. 6	That the Ministry prepare an insurance program related to the injuries sustained in sports and/or shop activities by students in elementary and secondary schools which result in loss of future earnings, and that the Ministry report to the Committee.	At the end of November, 1985, the Ministry struck a committee of four representing different aspects of the question. The committee is obtaining advice from an insurance consultant and a position paper will be prepared on the whole issue once the consultant's report is available.
		MINISTRY OF HEALTH					
3	40	That: 3) The Nursing Homes Act, 1972, be amended in order that provision be made for the successful candidate for the construction of a new home to make application for a conditional licence immediately upon the making of the award to him. This licence should be conditional	May 4, 1977	Agreed to implement recommendation.	5, p. 32	The Committee considered this complaint for the purpose of following up with the Ministry as to the implementation of the Ombudsman's recommendation as set out at pages 177 and 178 of the Ombudsman's Third Report.	Necessary amendments have yet to be enacted. The Ministry proposed an interim arrangement whereby on any call for proposals the Ministry will undertake to the successful proposer that he be awarded a licence provided he constructs and establishes the home in accordance with the Nursing Home Act and
					11, p. 21	The Committee accepted the interim arrangement	

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		MINISTRY OF HEALTH (cont'd)					
		on compliance with the terms of the proposal and any subsequent stipulations imposed by the Ministry prior to the granting of an unconditional licence.				on the understanding that the Act will be amended at some time in the future.	regulations. This interim arrangement was acceptable to the Ombudsman.
					12, p. 15	The Committee noted that it is still awaiting amendments to the legislation and will continue to monitor the Ministry's response to its recommendation.	
					13, p. 12	The Committee noted that the interim arrangement accepted by the Committee pending amendment of the Nursing Home Act continues to be followed by the Ministry and will be followed until the legislation is amended. The Committee expressed hope that the amendments will be brought forward soon.	The Ministry has advised that amendments are presently being drafted.